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The Old Yellow Book

THE OLD YELLOW BOOK

SOURCE OF BROWNING'S THE RING AND THE BOOK

A NEW TRANSLATION WITH EXPLANATORY NOTES AND CRITICAL CHAPTERS UPON THE POEM AND ITS SOURCE

BY

John Marshall Gest

"All for the truth's sake, mere truth, nothing else!"

THE RING AND THE BOOK, I, 881

PHILADELPHIA
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CONTENTS

CHAPTER PAGE

I THE STORY OF THE OLD YELLOW BOOK . . . 1

A critical narrative of the facts drawn from the record in the Old Yellow Book, with a chronology of the events.

II THE OLD YELLOW BOOK AND THE LAWYERS . 25

An explanation of the pamphlets, a résumé of their contents, the colloquial Latin in which they are composed, and an account of the lawyers, derived from mention of them in contemporary literature, their functions, and a defense of them against modern critics.

III THE LEGAL SYSTEM AND THE COURTS OF ROME IN THE TIME OF THE OLD YELLOW BOOK . . 51

An explanation derived from a study of the original sources, of the continental criminal law, and its literature, of the Courts that administered the system, and the punishments employed.

IV THE EXAMINATION OF PERSONS ACCUSED OF CRIME AND THE SYSTEM OF TORTURE . . . 70

The examination of criminals and the different methods of torture, particularly that of the Vigil, so often mentioned in the Old Yellow Book and The Ring and the Book.

V THE ARGUMENTS IN THE OLD YELLOW BOOK CONCERNING THE TORTURE OF THE VIGIL AND THE EFFECT OF CONFESSIONS 99

VI THE ARGUMENTS AS TO THE GUILT OF POMPILIA, BASED ON THE FACTS OF THE CASE 138

VII THE ARGUMENTS AS TO THE GUILT OF POMPILIA BASED ON CAPONSACCHI'S CONVICTION . . 256

VIII THE ARGUMENTS AS TO GUIDO'S RIGHT TO TAKE VENGEANCE "EX INTERVALLO" 285

IX THE ARGUMENTS AS TO THE HOMICIDES OF THE COMPARINI, POMPILIA'S PARENTS 397

CHAPTER PAGE

X The Arguments as to the Aggravating Circumstances of the Crime 426

XI The Argument in Defense of Guido's Confederates 516

XII The Claim of the Convent of the Convertites to Pompilia's Estate and the Final Decree 560

XIII Comments on the Case 600
A discussion of the legal questions involved.

XIV Comments on The Ring and the Book . . . 620
A criticism of Browning's poem, his methods and results.

APPENDICES

1 The Case of Beatrice Cenci 631

2 Original Texts of the Corpus Juris with a Translation 646

3 Some of the Principal Original Authorities . 659

4 Glossary of Technical and Unusual Words . 669

INDICES

1 Index of the Sections of the Arguments in the Old Yellow Book 689

2 General Index 697

TABLE OF REFERENCES AND ABBREVIATIONS

R & B. The Ring and the Book, by Robert Browning.

HODELL. The Old Yellow Book, source of Browning's The Ring and the Book, in complete Photo-reproduction, with translation, essay, and notes by Charles W. Hodell. Published by Carnegie Institution of Washington, July 1908. Second edition December 1915.

O. Y. B. The facsimile of the Old Yellow Book as contained in above. The pages are referred to by Roman numerals.

E. OR EVERYMAN. Translation of the Old Yellow Book in Everyman's Library. J. M. Dent & Sons, Ltd. Sections and passages of the Old Yellow Book are referred to by Roman page numerals of the O. Y. B., followed by Arabic page numerals of the Everyman edition.

PARAGRAPHS and sections of the Latin arguments are indicated by § followed by the first words of the section, with the pages of the O. Y. B. and Everyman translation indicated as above.

PAGES of this book are indicated by p.; the chapters are referred to as such in Roman numerals, and the sections of the present translation of the arguments by the abbreviation sec. following the references to the chapters of this book.

SIR FREDERICK TREVES: The Country of The Ring and the Book. Cassell & Co. Ltd. 1913. Very interesting and valuable.

A. K. COOK. A Commentary upon Browning's The Ring and the Book. Oxford University Press. 1920. The best commentary that has appeared upon the poem, and indispensable to the student. This book was practically completed before Mr. Cook's commentary was published.

PREFACE

Every student of Browning will probably agree with Landor's estimate:

> Shakespeare is not our poet, but the world's,
> Therefore on him no speech! and brief for thee,
> Browning! Since Chaucer was alive and hale,
> No man hath walk'd along our roads with step
> So active, so enquiring eye, or tongue
> So varied in discourse.

And the majority of Browning students will probably claim that The Ring and the Book, if not his greatest poem, is, at least, his chef-d'œuvre; and even those persons who will not admit that it is a poem at all, will concede that it is an astounding tour de force. Browning displays in it to the utmost his genius for analysis, his skill in narrative. and his dialectic ingenuity.

But everyone will surely agree that the least satisfactory parts of The Ring and the Book are those concerned with the legal arguments; and this is especially to be regretted as The Ring and the Book is based on the trial of Guido Franceschini, and Browning professes to transmute the crude metal of the Old Yellow Book into the pure gold of his poem. I suppose my experience is common enough. When I first read Book VIII (Dominus Hyacinthus de Archangelis), and Book IX (Juris Doctor Joannes Baptista Bottinius), I felt dazed. I wondered what it was all about, nor did a reperusal assist my understanding. These Books with their queer jumble of dog latin interspersed with heavy or silly attempts at humor, conveyed little meaning and produced little impression on my mind, beyond a feeling of

tantalized curiosity. When, however, Professor Charles W. Hodell published through the Carnegie Institution of Washington, his magnificent reproduction of the Old Yellow Book, it seemed that at last it would be possible to obtain a clear understanding of Browning's great effort, for this sumptuous volume contains not merely a photographic facsimile of the Old Yellow Book, but also a translation by the Editor, together with his elaborate essay on the poem and numerous painstaking annotations, for which every student and lover of Browning should be forever grateful. The translation of the arguments, however, omits the citation of their authorities, on the ground as stated by the Editor, that these are untranslatable. A legal argument, without the authorities upon which the argument depends, reminds one of Sir Walter Scott's simile of Hamlet, the character of the Prince of Denmark being left out, or to employ a more homely comparison than Hamlet, let us say a ham omelet without any ham. The flavor is gone; so that it is impossible to gather from this splendid edition of the Old Yellow Book, a clear idea of the legal questions that were so hotly debated. More than this, as I read the translation in comparison with the original Latin I found myself obliged to differ from the translator's rendering of many legal phrases, and I, therefore, found it necessary to make a new translation for the purpose of my study. My first intention was to publish a mere synopsis of the arguments from which the non-professional reader might obtain an elementary idea of the contents of the Old Yellow Book, but I found so much of interest that I determined upon the present more ambitious volume.

In this book, therefore, I have endeavored to set forth what I could learn about the law and the lawyers of the Old Yellow Book; the actual facts of the case as they appear in the record; the law that was applicable to them; the lawyers

who were the counsel for the prosecution and for the defense; and the legal procedure in effect in Italy at the time of the trial, including particularly the torture which was such an important part of it. I have set forth in full the arguments of counsel according to my own translation, collating them from the various pamphlets of the Old Yellow Book, and arranging them in what seems to me to be their logical order; adding to the arguments the references to the authorities, which I have verified from the original sources, whenever that has been possible, with extracts from the most important of them. I have added my own comments upon the facts and the law of the case, and Browning's treatment of them, many of my conclusions being, I regret to say, different from those of the numerous essayists and critics who have written of The Ring and the Book. I have also annexed in Appendices the actual Texts or translations of some of the most important Texts and leading cases cited as authorities; some notes on the Latinity of the Old Yellow Book, and a glossary of words unusual in themselves, or employed with unusual meanings; also on account of its historical and literary interest a translation of the celebrated consilium or argument of Farinacius in behalf of Beatrice Cenci, which is several times referred to by counsel in the Old Yellow Book. Finally I intended to add a Bibliography of the authorities especially consulted in the preparation of the translation, but have been obliged to omit it in printing from consideration of space.

The book has been written at odd times, and in the intervals of pressing duties, and it has cost me an immense expenditure of time and trouble, particularly as I was obliged to collect a special library of many hundreds of volumes, containing the medieval and post-medieval Continental criminal law. Perhaps my pains have been wasted, and very probably might have been more profitably

bestowed on other things. I might even have learned to play Bridge, or contracted Golf, which is a disease rather than a game. Yet as Browning himself put it, reminiscent of classical phrase and medieval legend:

> "the very fiends weave ropes of sand
> Rather than taste pure hell in idleness."

But I did not choose to write this book, it chose me. As Samuel Butler said (not the Hudibras man, but the S. B. who wrote Erewhon), "Only do that which insists on being done, and runs right up against you, hitting you in the eye, until you do it. This calls you, and you had better attend to it, and do it as well as you can."

That this book contains errors, I have no manner of doubt, and if any kindly critic should point them out, I will say with Lord Coke, "Blessed be the amending hand;" although as Mrs. Squeers used to tell the persecuted pupils of Dotheboys Hall, "It will be all the same a hundred years hence," or to pluck a proverb from my pilgrim's plack, "after all, nothing makes any real difference."

And now as my work is ended, and I look up at the shelves on which repose the tomes of Farinacius, Clarus, De Angelis, Hippolytus de Marsiliis, and the other great criminalistae — those quaint and curious volumes of forgotten lore, whose authors have rested from their labors centuries ago, I can almost fancy that I see the shades of Hyacinthus de Archangelis and Desiderius Spretus, of Joannes Baptista Bottinius and Franciscus de Gambis, and eke of Antonius Lamparellus, foregather in my study to bid me farewell who have lived with them so long. I have learned to like these men. They were not slothful in business, they were fervent in spirit, if not serving the Lord, at least serving faithfully their clients. I would welcome their ghostly visitation. I would, if I could, ask them to explain certain puzzling passages in their arguments, and sundry

fine points of law, but more than all else I would like to read them what Browning and certain English and American critics have said about Caponsacchi "the chivalrous priest," and Pompilia, "the star of purity," "so sweet and true and pure and beautiful." I would ask them in Horatian phrase:

Risum teneatis amici?

And they would answer in the words of the same poet:

Solventur risu tabulae.

JOHN MARSHALL GEST

542 City Hall
Philadelphia
January 1, 1925

AUTHOR'S NOTE

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J. M. G.

THE OLD YELLOW BOOK

CHAPTER I

THE STORY OF THE RING AND THE BOOK

"Do you see this square old Yellow Book, I toss
I' the air, and catch again, and twirl about
By the crumpled vellum covers,— pure crude fact
Secreted from man's life when hearts beat hard,
And brains, high-blooded, ticked two centuries since?
Examine it yourselves! I found this book,
Gave a *lira* for it, eightpence English just,
(Mark the predestination!) when a Hand,
Always above my shoulder, pushed me once,
One day still fierce, 'mid many a day struck calm,
Across a Square in Florence, crammed with booths * *"

On that memorable day in June 1860 — some say 1859 —[1] Robert Browning on his way home by San Lorenzo Square to Casa Guidi, by chance or Fate, or impelled by his familiar Daemon with friendly hand on shoulder, happened on his treasure trove, the Old Yellow Book, whose pamphlets contained the pure crude facts of the trial of Count Guido Franceschini and his associates in crime for the murder of his wife, Pompilia, and her parents, Pietro and Violante Comparini. According to his poetic version of the incident, he read the book as he walked from San Lorenzo Square to Casa Guidi, and in that short time mastered its contents and knew the whole truth, gathered together and bound up in that book.

[1] See as to the date, A. K. Cook, Appendix I.

The feat is so astounding that I can only in emulation of Tertullian credit the story because it is impossible. It has been said indeed by Mrs. Orr, Browning's biographer, that before Browning completed his poem, he had read the Old Yellow Book eight times, which is likely enough for he exhibits great familiarity with many of its details, but whether even then he had fully "mastered its contents" is more than doubtful.

Using the crude facts of the Old Yellow Book as his raw material, in like manner as the jeweller used the yellow gold to fashion a ring, Browning elaborated his wonderful series of monologues, The Ring and the Book. The artist, he says, mingles gold with gold's alloy, effects a manageable mass, works the ring in shape, and then a spirt of fiery acid dissolves the alloy, and the finished jewel appears:

> "No carat lost, and you have gained a ring,"

says Browning,

> "So in this book lay absolutely truth
> Fanciless fact, the documents indeed"—
> "But was this truth of force?—
> Sufficient, self-sustaining? Why if so —
> Yonder's a fire, into it goes my book."

Browning must make the facts his own. Shall he tell the story in offhand style, straight from the book? "Yes and no;" the poet answers —

> "From the book, yes; thence bit by bit I dug
> The lingot truth, that memorable day,
> Assayed, and knew my piecemeal gain was gold —
> Yes; but from something else surpassing that,
> Something of mine which, mixed up with the mass,
> Made it bear hammer and be firm to file.
> Fancy with fact is just one fact the more."

* * * *

"So I wrought
This arc, by furtherance of such alloy,
And so, by one spirt, take away its trace,
Till, justifiably golden, rounds my ring."

So much at present for Browning's purpose and method. It will be seen hereafter whether he kept to his method and achieved his purpose. Let us now recount, but briefly, the crude facts of the case. I say briefly, for it may be assumed that no one will care to open this book who is not already acquainted with the triangular story of Guido, Caponsacchi, and Pompilia.

In the last quarter of the seventeenth century there lived in Rome one Pietro Comparini and his wife Violante, with their daughter, Francesca Camilla Victoria Angela Pompilia, "so many names for one poor child," called generally Francesca or Pompilia, who became the heroine of this sordid tragedy. According to the record of her baptism, she was born on July 17, 1680, but whether she was in fact the daughter of the Comparini, or their pseudo-child, is one of the disputed questions of fact. At any rate she was brought up by them from infancy as their daughter, and her birth was not questioned by any one until much later events made it convenient for Violante to make the allegation so discreditable to herself and so cruel to Pompilia, that she was in truth the child of a disreputable woman by an unknown father. The Comparini while not wealthy were in the possession and enjoyment of an income derived from a fidei commissum or trust estate, the terms of which trust are only obscurely referred to. According, however, to Gambi's statement, § Facti ideo, LXI, 65, the fraud was committed

in order that an heir might be provided for the estate, or as we should say, a remainderman, in default of whom it would appear from § Credidit infelix, XIX, 20, that the estate would go to others, or as it is put in the "Trial and Death of Franceschini," to another house, probably another branch of the family. It is indeed said in § Justior etiam, LXXI, 78, § Verum etiam, CCXLVI, 243, Anonymous Pamphlet 10 and in "The Trial and Death of Franceschini" that Violante's fraud was intended to bar her husband's creditors. How this could be is not apparent. Mrs. Orr indeed suggests in her Handbook, p. 78, that as creditors were pressing, the Comparini might, if they had a child, draw on their capital, but the legal arguments in the Old Yellow Book do not refer to this. The question must remain unsolved, but after all it is not especially important, as the fact is clear that the birth of a child would be to the benefit of Violante and her husband.

Enter the "Count." Born on January 24, 1657-1658, Guido Franceschini was nearly thirty-seven when the story of The Ring and the Book begins; Browning following the Secondary Source makes him forty-six at this time, and in Tertium Quid 718 describes him as

> "Little, long-nosed, bush-bearded, lantern-jawed."

His portrait is not prepossessing, and perhaps justifies this representation; it reminds one somewhat of Thomas Carlyle in an especially atrabilious mood; which is hardly to be wondered at, if it be true that the sketch was made only a few days before his execution. Though born of a noble Aretine family, and having apparently some

influential connections, Guido had not made a brilliant success of life, financially or otherwise, and was quite willing to marry a girl with a sufficient or even moderate dowry. Such a one was found for him in the person of Pompilia, heiress of the fidei commissum, to which it seems her parents added some other property. He, on his part, or his brother the Abate Paolo for him, represented his property as considerable, and so the match was quickly arranged by Violante and Paolo. Whether the marriage was clandestine or not so far as Pietro was concerned, does not seem material. He appears at any rate to have signed the marriage contract which was witnessed by Cardinal Lauria, Paolo's patron; indeed the Cardinal may have taken an active part in the transaction. This contract provided moreover that Guido should after the marriage take his parents-in-law to Arezzo and maintain them there.

The marriage was celebrated in the Church of San Lorenzo in Lucina at Rome. Sir Frederick Treves, whose industry secured a copy of the original church register, has thus ascertained the date to be Sunday, September 6, 1693. It would appear from Pompilia's deposition, LXXXII, 91, that the marriage was not consummated for two months, but by the following December the newly married couple were living together with their respective families at Guido's home in Arezzo. The most ardent advocate of early marriage must admit that Pompilia was rather young to undertake her perilous voyage upon the high seas of matrimony, yet very early marriages were the custom of the country, and Juliet of the House of Capulet was scarce fourteen when she became the

immortal heroine of love, and Lady Capulet said to her:

> "Well, think of marriage now, younger than you
> Here in Verona, ladies of esteem,
> Are made already mothers. By my count
> I was your mother much upon these years
> That you are now a maid."

"Old Capulet" it might also be noted must have been sixty while his lady was by her own confession twenty-eight, but when Paris pleaded for Juliet's hand, and said "Younger than she are happy mothers made," he with the wisdom of age replied: "And too soon marr'd are those so early made."

Pompilia's marriage was certainly not a love match, but one arranged for her according to the custom in her day and country, such indeed as are many marriages even now upon the Continent; yet this alone need not have blasted it, as Mrs. Malaprop said to Lydia Languish in The Rivals, "I am sure I hated your poor dear uncle before marriage as if he had been a black-a-moor — and yet, Miss, you are sensible what a wife I made!"

It is the combination, however, that in matrimony as well in gastronomy, spoils the pudding, and when to all else was added the fact that the two mothers-in-law under the same roof immediately strove for the hegemony, discord resounded, which was in no manner softened when the parties to the matrimonial bargain mutually discovered that each of them had been deceived as to the wealth of the other. That such a marriage should be unhappy was inevitable, that it resulted in a tragedy is not surprising. Yet even the prejudiced affidavit of the maid servant, Angelica,

made in June 1694, as to the goings on in the Franceschini household in the preceding January, discloses no abuse of Pompilia by her husband, and after the Comparini had returned to Rome in March or April Guido and Pompilia appear to have lived together without open rupture. Even if Pompilia's letters of June 14 and July 19, 1694, to the Abate Paolo be given no credence, her own deposition complains of no ill treatment until after she had been married a year, when she failed to present her husband with an heir, and from the letters of the Governor of Arezzo in the following August, and of the Bishop in September of the same year, it would seem that Pompilia's dissatisfaction was due to her alleged desire to return home at the instigation of her parents, and not to any ill treatment by Guido. There is nothing in the evidence from 1694 to the time of her elopement to warrant a finding that she suffered any real abuse; even in her own deposition she refers only to her husband's threats occasioned by his jealousy of Caponsacchi, which probably arose in 1696.

But immediately after the Comparini returned to Rome, the Jubilee that had been proclaimed by the Pope, according to the Secondary Source, so quickened Violante's torpid conscience that she disclosed to her confessor the fraud of which she had been guilty at Pompilia's birth. The Jubilee was a great ecclesiastical festival, and was originated by Boniface VIII, who by Bull dated February 23, 1300 (Henderson's Historical Documents of the Middle Ages p. 349) declared that year and every hundredth year thereafter, a year of Jubilee, granting pardon of sins to all who should visit the churches in Rome for at least thirty days

consecutively. The festival was a great success, as a million strangers were said to have visited Rome with more money when they came than they had when they went home. It was impossible to wait for a century to repeat what was equivalent then to an International Exposition in modern times, so another Jubilee was declared for the year 1350. Later in the century the period was reduced to thirty-three years, and by Paul II in 1470 to twenty-five years. Extraordinary Jubilees were also declared on special occasion, ad instar jubilaei. Innocent XII in the beginning of his Pontificate November 12, 1691, declared a Jubilee, and another invoking Divine aid for peace among Christian people December 8, 1693. This was doubtless the Jubilee referred to in the Secondary Source, for Violante's disclosure must have antedated the next Jubilee proclaimed on December 3, 1695. These Bulls may be found in the Collectio Bullarum Innocent XII at pp. 19, 163 and 210.[2]

However, whether Violante's conscience was pricked, or as I venture to suspect, her avarice and malice were excited by her experiences in Arezzo, she claimed publicly that Pompilia was not her child, and Pietro brought suit against Guido to recover the dowry, and the case was heard by Joannes Domenicus Thomatus as Auditor Curiae. According to the Anonymous Pamphlet No. 15, the facts of Pompilia's birth were proved by six witnesses, but Thomatus decided in favor of Guido, whereupon Pietro appealed to the Sacred Rota; the appeal, however, remained undetermined before Josephus Molines, an Auditor of the Rota,

[2] Mr. Cook, p. 41, says that the last Jubilee took place in 1900. The article "Jubilee" in the Catholic Encyclopedia may also be consulted. A Jubilee is announced for 1925.

to whom the case was assigned. My examination of the Decisions of Molines, in eight bulky volumes, discloses no reference to the case. It may readily be supposed that this suit was the cause of terrible mortification to Guido, and produced a very natural hatred of the Comparini. The deposition of Angelica was perhaps procured for use in that suit or probably for circulation in Arezzo, but it does not appear that Guido took any action except to defend the litigation.

Guiseppe Maria Caponsacchi was born on May 26, 1673, and was consequently at the time of his elopement with Pompilia in 1697 twenty-four years old. He was of noble rank, a sub-deacon in the church of the Pieve at Arezzo and was made a Canon at the age of twenty. He was not a priest, did not claim to be a priest, and is never called a priest in the Old Yellow Book. Bottini in § Usus quoque, CLXXV, 186, specially claims that he was not a priest, and yet Browning, who must have known the fact, makes Caponsacchi claim to be a priest, and constantly refers to him as such, followed in this by all the Pompilia and Caponsacchi worshippers, whose adulation of him, as a soldier-priest, a saint, a Christian hero and a St. George is nauseating to any one who takes the trouble to read the cold facts of the story in the Old Yellow Book.

Caponsacchi, in spite of his Ecclesiastical office, seems to have been merely a sturdy young man about town. He called himself a gallant man and probably was such in both senses of the phrase; perhaps we should call him a lady's man or a squire of dames; and Pompilia in her deposition mentions his flirtations with the girls in the streets. Caponsacchi was well acquainted with Giovanni

Battista Conti, another Canon of the Pieve, whose brother had married Guido's sister, and the friendship that sprang up between Pompilia and these young men, especially Caponsacchi, was sufficiently manifest to arouse Guido's jealousy. The episode in the playhouse about which so much poetry has been written, when Conti who was sitting beside Caponsacchi threw some candy over to Pompilia, probably took place, according to Sir Frederick Treves, towards the end of 1696. According to Pompilia's story her domestic unhappiness continued, and was due to her husband's jealousy about Caponsacchi, so much so that he threatened her life, and she therefore induced Caponsacchi to escort her to Rome. According to Caponsacchi's testimony he agreed to do this, for the seemingly peculiar reason that he understood Guido intended not merely to kill his wife, but also to be revenged on Caponsacchi himself. Pursuant to their arrangements they eloped together at one o'clock in the morning of Monday, April 29, 1697, in a light carriage called a Calesse, which was very probably like the vehicle of that name described by Smollett in his Travels through France and Italy in 1764-5, as a wretched machine on two wheels, uneasy as a common cart. In this equipage the eloping couple arrived at Castelnuovo, a small hamlet about fifteen miles from Rome, on the day following at seven-thirty in the evening. They staid at the inn all night and were overtaken there by Guido in the morning as they were about to proceed to Rome, and on his complaint were arrested and taken to prison. The prosecution then instituted was known as the Processus Fugae, or Prosecution for Elopement, and was tried in the court of the Governor of Rome, within whose

jurisdiction the case lay, before Venturini, the Vice or Deputy Governor. No definite judgment appears to have been entered against Pompilia, but in September or possibly earlier, she was placed by order of the Court in the monastery of the Scalette, an institution for penitent women, as a place of safe keeping or custody. Caponsacchi, however, on September 24 was banished, or strictly speaking, relegated to Civita Vecchia for three years, "pro complicitate in fuga, et deviatione Francescae Comparini, et cognitione carnali eiusdem," that is, he was found guilty of three offenses and sentenced accordingly, viz., for complicity in the elopement or flight, and for the seduction of Francesca Comparini and for carnal knowledge of her, not as Browning and his editors would translate the decree "for complicity in the flight and running away of Francesca Comparini and for carnal knowledge of the same, etc." The error is important. The "deviatio" was not Pompilia's running away, but Caponsacchi's taking her away, or leading her astray, seduction in short, and of this he was found guilty as well as of the two other charges.

The reader should also note that in this prosecution the defendants were represented by Lamparelli, the Procurator of Charity, an officer whose functions were in a measure like those of the Procurator of the Poor. It was Lamparelli, who after the death of Pompilia, made the argument contained in Pamphlet 17, and obtained the decree establishing Pompilia's reputation, in order that the claim of the Monastery of the Convertites might be refuted. The prosecution in the Processus Fugae was, of course, conducted by the Procurator or Advocate of the Fisc, perhaps by both.

In the subsequent trial of Guido for homicide the prosecution was necessarily also conducted by them, but in the Prosecution for Elopement, the Fisc endeavored to show the guilt of Pompilia and Caponsacchi, whereas in the homicide case it became his duty to prove their innocence, because their guilt was asserted by Guido as his excuse for the crime. So also Lamparelli refers in the first section of his argument, § In contentione, CCXLIII, 241, to his embarrassment because the exercise of his official duty to Pompilia might, if it had been performed during the trial of Guido, have operated to the prejudice of the defense, which was conducted by the Procurator and Advocate of the Poor, they being in a sense his official colleagues.

At some uncertain time during this year, but probably during her residence at the Scalette, Pompilia brought suit against Guido for a divorce, that is, judicial separation from bed and board, not an absolute divorce, which the law did not permit. The grounds of the action are not stated, but were probably what we should call cruel and barbarous treatment. The suit was never brought to a hearing.

On October 12, 1697, Pompilia's approaching confinement made her continued residence in the Scalette improper or inadvisable, and she was, therefore, permitted to return to the home of Pietro and Violante, giving bond with surety in the penal sum of 300 scudi not to leave it, that is, to keep the home as a prison.

At some other uncertain time, which must, however, have been before this date, October 12, 1697, Guido instituted a criminal prosecution in Arezzo against Pompilia and Gregorio Guillichini,

and the driver of the carriage in which Pompilia eloped. Pompilia was charged with infidelity committed with Guillichini and Caponsacchi, Pompilia and Guillichini were charged with the theft of numerous articles of clothing, jewelry, etc., from Guido's house; the driver was charged with assisting in the elopement. The Commissioner of Arezzo found them guilty and condemned Guillichini to the galleys for five years; Pompilia to the Prison of the Stinche for life. The Criminal Court of Florence, however, on appeal reduced the sentence of Guillichini to an indefinite period, and suspended sentence against Pompilia, she being then at the Monastery in Rome. The driver of the carriage was discharged.

Why Caponsacchi was not included in this indictment is very strange; and why Guido's counsel did not make use of this decree in his defense is one of the unexplainable difficulties in the Old Yellow Book. It must have been well known to them, and was entered as recently as December 24, 1697, immediately before the homicide. The certificate of the proceedings, however, is dated February 14, 1697 (for 1698), and Guido's case according to the manuscript letter of Del Torto to Cencini was decided on February 18. Very possibly the "proofs" which Cencini sent to Archangeli at his request and which arrived too late may have included this delayed certificate. Evidently the reference is to something other than the proof of Guido's clericate, for which a messenger was dispatched to Arezzo; perhaps the proof of Pasquini's minority was also intended, but the letter distinctly says that the proofs which Cencini sent to Archangeli were in behalf of Guido. The reference in § Levioris ponderis,

LXXIV, 81, to the kissing on the journey to which the driver of the carriage bore witness might possibly be taken from this record, but in this section the name of the driver is given as Francesco Giovanni de Rubris (or Rossi), whereas in the prosecution he is said to be Francesco, son of Giovanni Borsi, called Venerino. Aside from that the arguments of counsel contain nothing derived from these proceedings at Arèzzo and Florence.

On December 18, 1697, Pompilia gave birth to a child, Gaetano, and Guido's suspicion as to its paternity would naturally have added to the troubles in which he was involved, and probably determined his course of action. He called to his assistance four men, one of whom at least was a laborer on his estate, and as it appears engaged their services for hire, and with them he set out for Rome where he arrived on December 24, 1697. Having waited at Ponte Milvio in the environs, he with the hired assassins went to the Comparini home on January 2, 1698, about seven o'clock in the evening or perhaps a little later, and obtained entrance on the pretext of the delivery of a letter from Caponsacchi. Violante opened the door and was immediately killed, as was her husband, Pietro. Pompilia was mortally wounded but survived until January 6th. It is not clear who struck the murderous blows. Biagio merely stood guard at the door, perhaps Domenico did the same. Francesco by his own confession stabbed Pompilia several times; in all probability Guido and Alessandro assisted in the murders, although Archangeli, § Nec relevat, CXXI, 129, intimates that Guido did not use the arms.

Guido and his companions fled and reached Merluccia or Merluzza, about fifteen miles from

Rome on the road to Arezzo, where they were arrested the same night. They were brought back to Rome for their trial which began expeditiously enough at some time during the same month of January.

The trial took place before the Governor of Rome, or rather the Vice Governor, Marco Antonio Venturini, not, as Browning supposed, before Thomati, when the Fisc or prosecution was represented by Francesco Gambi as Procurator and Giovanni Battista Bottini as Advocate. The prisoners were represented by Giacinto Archangeli as Procurator of the Poor and Desiderio Spreti as Advocate of the Poor, whose respective functions will be hereafter explained. For the present it will be merely observed that these men were experienced and zealous lawyers, whose conduct of the case, in the performance of their official duties, merited the highest praise, while Browning's travesty of their arguments and his contemptuous ridicule of the men themselves, in which he is echoed by all his unthinking followers, deserve serious condemnation.

The trial, of course, was conducted in accordance with the system of law then in force in Rome, and in general throughout Italy, founded on and developed from the Roman and Civil Law, as will be more fully described in a subsequent chapter. The reader will bear in mind throughout that this was not the so-called ecclesiastical law at all, but the general law governing the community in its ordinary civil and criminal relations. Nothing is more amusing than to read what the critics say of the ecclesiastical law as connected with this case, and the wonder of some of them at Browning's "familiarity" with it. Even that careful critic, Mr. A. K. Cook, is under the impression that

the trial took place in the ecclesiastical tribunal. Browning, great poet as he was, shows in fact no acquaintance with law at all, and his references to it are either trite or inaccurate or contemptuous. Of course, a poet is not in general bound to study or understand law, but on the other hand he is not compelled to write a poem on a legal subject, and I maintain that whenever any writer, poet or not, selects a subject, he should before he writes about it, take some pains to acquire sufficient knowledge of it. This is discussed in the last chapter of this book.

In accordance with the practice the defendants were first subjected to an examination in order to obtain their confessions, the testimony of witnesses was also taken, all being in writing, and then the first stage of the hearing began. Archangeli opened for Guido, followed by Spreti for all the prisoners, and then Archangeli argued for Guido's associates in crime. Gambi then opened generally for the prosecution, followed by Bottini in two briefs. The Fisc in these arguments discussed generally the merits of the case, replied to counsel for the defense, and demanded that the prisoners be subjected to the torture of the Vigil, in order to obtain fuller confessions. The Court so decreed, but the actual infliction of the torture proved unnecessary in the case of Guido. It would appear that it was inflicted upon Alessandro Baldeschi, and probably on Gambassini and Pasquini. Agostinelli, who took no part in the homicides, but stood guard at the door, appears not to have been re-examined, and was exempted from the decree imposing the Vigil.[3]

[3] See on this subject A. K. Cook, Appendix VI; § Confessiones, cxxv, 133, Ch. V, sec. 11.

The second stage of the trial then began and the supplementary confessions and other evidence were produced. Archangeli followed by Spreti laid special emphasis on the illegality of the decree for torture, and the invalidity of the confessions obtained through this torture or the fear of it; Gambi followed by Bottini answered, and Spreti replied for the defense.

On February 18, 1698, the sentence of death was pronounced on Guido and his four associates; but as Guido had been admitted to some minor order of the clergy, — it does not appear which one — and one at least of the other defendants was a minor, the claim was made that the penalty should be mitigated in their cases, and a delay was granted that proofs of these facts might be obtained. The decision of these questions lay with the Pope, to whom this appeal for clemency was made, but it should not be supposed that he undertook to determine the guilt or innocence of the prisoners, who had been found guilty by the Court. The Pope had merely to decide whether in view of the facts alleged the case called for the allowance of Guido's clericate, or for his exercise of executive clemency, and the Pope did not necessarily review the entire record as an appellate court would do, and as Browning evidently supposed he did. The tenth book of The Ring and the Book therefore is purely imaginary, though it contains some of Browning's finest poetry. However, the Pope without waiting for the final proof of the facts promptly denied the application, and accordingly on February 22, 1698, Guido was beheaded and his four companions were hung.

While the trial of Guido was in progress, sometime in January 1698, a suit was brought by the

Monastery of the Convertites against the heir beneficiary of Pompilia's will, one Domenico Tighetti, on the ground that as she was a woman of bad character, the monastery was entitled to her estate under certain Papal Bulls, which will be referred to hereafter. Several affidavits were obtained on January 10, 1698, from Celestino Angelo, an Augustinian friar, and other persons who were present in attendance upon Pompilia in her last hours, certifying to her dying declarations of her innocence and to her purity of mind. These affidavits were used in Guido's trial, though strongly objected to by his counsel, but were probably obtained with special reference to the suit of the Convertites. The suit, however, was not pressed to a definite conclusion for Lamparelli as Procurator of Charity after Guido's death intervened in the Processus Fugae, or the prosecution of Pompilia for her elopement, and prayed for a decree absolving her memory. This does not appear to have been seriously contested. We have Lamparelli's argument in Pamphlet 17, and the record shows that the Criminal Court, that is, the Court of the Governor of Rome, sometime prior to May 17, 1698, decided after two votes, in favor of her absolution, and in the subsequent Pamphlet 18 appear the formal proceedings necessary in order to obtain a final judgment where all parties were cited to appeal within the regular period.

I append to this introductory chapter a chronology of the facts of the Old Yellow Book with references to the authorities for the various dates.

CHAPTER I. (ADDENDUM)

The chronology of the events of the O. Y. B. is not always clear, but I have endeavored to arrange them in their correct order, giving the references to the pages of the O. Y. B. and Everyman edition whenever possible, and placing in brackets the dates and events which cannot be fixed with reasonable certainty.

1658, Jan. 24 Guido Franceschini born. Everyman, note 36.

1673, May 26 Guiseppi Maria Caponsacchi born. Everyman, note 34; Hodell, note 26, says March 26.

1680, July 17 Francesca Camilla Vittoria Angela Pompilia born, reputed child of Pietro and Violante Comparini. Baptismal certificate dated February 9, 1698, CLV, 159.

1693, Sept. 6 Pompilia married to Count Guido Franceschini. Secondary source, Hodell, 209. Everyman, 259. Treves, 299. The marriage was not immediately consummated.

Dec. Guido and Pompilia, with the Comparini, moved to Arezzo. Cook, Appendix III.

1694, Jan. Angelica entered their service. Angelica's deposition, XLIX, 49.

Feb. 12 and March 6 According to letters of Abate Paolo on these dates, cited by Bottini, LXIX, 76, and Lamparelli, CCXLV, 243, there existed a very bitter feeling between Guido and the Comparini.

March-April. The Comparini returned to Rome, "Post paucos menses," Bottini, LXIX, 76; Lamparelli, CCXLV, 243; "Doppo pochi mesi," Anon. Pamphlet 15, Hodell, CCXI, 213; "Spatio di quattro mesi," Pompilia LXXXIII, 91. Mr. Cook after a careful examination fixes the date as early in April; see Cook, Appendix III.

1694, March-April. Violante reveals the fictitious parentage of Pompilia, said in Anon. Pamphlet 15, Hodell, CCXII, 214, Secondary source, Hodell, 210, Everyman, 261, to have been at the time of the announcement of the Jubilee. Immediately thereafter Pietro brought suit against Guido to recover the dowry on the ground that Pompilia was not his daughter. "As soon as Pietro and Violante arrived in Rome," etc. Notizie di fatto, Anon. Pamphlet 10, CXLIII, 147. "Scarcely had they reached Rome," Hodell, 219, Everyman, 272. This suit was brought in the Sacra Rota, Anon. Pamphlet 15, CCVIII, 210, before Auditor Camerae Thomatus, who decided in favor of Guido, Anon. Pamphlet 15, CCXII, 213; Gambi, CLXI, 167. Pietro appealed in the Rota before Molines, Anon. Pamphlet 15, CCXII, 214. The decree was approved in "Segnatura di Giustizia," Notizie di fatto, Pamphlet 10, CXLIV, 148. Add. Pamphlet, Everyman 273. This appeal was before Pompilia's elopement, Gambi, LXI, LXII, 65-66. Pietro's will, which Bottini, CLXXXVI, 191, says was made in 1695, recites this litigation as then pending, and it was not decided when the homicide was committed, Bottini, CCI, 205.

June 14 Pompilia's letter to Abate Paolo, LV, 56.

June 24 Affidavit of Angelica Battista, LIX, 49. She was probably then in the service of the Comparini. The affidavit may have been originally intended for use in Pietro's suit to recover the dowry, but was used in Guido's trial.

July 19 Pompilia's second letter to Abate Paolo, LXXXVIII, 95.

Aug. 2 Letter of the Governor of Arezzo to Abate Paolo, LXXXI, 89.

Sept. 15 Letter of the Bishop of Arezzo to Abate Paolo, XCI, 99.

1694, Oct. 7 Date of power of attorney given by Guido to Paolo, CLVIII, 162. This was doubtless given in connection with Pietro's suit. Its authority with reference to the Prosecution for Elopement, is one of the disputed questions in Guido's trial.

[1697, March and April] Pompilia alleged to have sought the assistance of the Confessor Romano, and of Guillichini, Conti, and Caponsacchi.

1697, April 29 1 A.M. [Monday] Pompilia eloped with Caponsacchi. "Evening of April 28," Sentence of Criminal Court at Florence. Hodell, v. Everyman, 5. "On the last Monday of April as soon as day dawned," Secondary Source, Hodell, 211. Everyman, 262. "At dawn," Pompilia's deposition. LXXXV, 93. "At one o'clock in the morning," Caponsacchi, LXXXIX, 96.

April 30 7.30 P.M. Pompilia and Caponsacchi arrived at Castelnuovo. "On Tuesday evening," Caponsacchi, LXXXIX, 97. According to witnesses cited by Archangeli, CXI, 119, at 7.30 P.M. "Arrived at night," Anon. Pamphlet 15, CCXIV, 216. "We arrived at dawn," Pompilia, LXXXVI, 94, which false statement is followed in Add. Pamphlet, Everyman, 274.

May 1 in early A.M. Guido overtakes them at Castelnuovo, and Pompilia and Caponsacchi are arrested.

May 3 Pompilia's letter to her parents, written in prison at Castelnuovo. Copy of letter, CLV, 160. The Processus Fugae or "Process of Elopement," was instituted at this time, said to be before Pallavicino, the Governor of Rome. Add. Pamphlet, Everyman, 275.

May 13 Pompilia's deposition or examination in the Processus Fugae. Date shown by extract in Pamphlet 4 in Summary of Fisc, No. 5, LVI, 57; LXXXII, 90.

May 24 Pompilia's further examination. In O.Y.B. date given by error as March 21, 1697. LIV, 55.

[1697, May] Caponsacchi's examination. LXXXVIII, 95. The precise date is not stated.

1697, June 17 Various attestations as to Pompilia's recourse to the Bishop and Deputy Governor, because of her husband's cruelty, by Canon Tortelli, Romano et al. LIII, 53.

Sept. 24 Tuesday. Decree of relegation of Caponsacchi. XCVII, 106. Date referred to by Spreti, CXXVI, 134. Said to be "in congregatione." Gambi, CLIX, 165.

Sept.— Pompilia probably placed in the Scaletta at or about the same date. Hodell, notes 276, 285. She remained only two or three weeks, A. K. Cook, p. 50, but according to Anon. Pamphlet 10, CXLVII, 151, she was there for some months.

Oct. 12 Pompilia permitted to return home under bond to keep it as for a prison. Bottini, CLXXXIV, 189. Copy of bond, CLV, 159.

[1697] Pompilia brings suit for divorce before the Vice Governor. Anon. Pamphlet 15, CCVIII, 210. The date is uncertain.

[1697 Oct. ?] Criminal suit in Florence against Pompilia, Guillichini, and Francesco Borsi or Venerino, the driver, for complicity in the elopement, and for theft. V, 5. As the record states that Pompilia was imprisoned in a sacred place, the sentence must have been before Oct. 12, when she was removed from the Scaletta to Pietro's home.

[1697] Criminal prosecution against Pompilia for adultery before the Governor. Anon. Pamphlet 15, CCVII, 210. Query, is not this the same as the Processus Fugae, which was "still pending"?

Dec. 18 Pompilia gives birth to her child, Gaetano. Bottini, CLXXXIV, 189. "In December," Notizie di fatto, Pamphlet 10, CXLVIII, 152.

Dec. 24 Date of final sentence in Criminal Court of Florence against Guillichini and Pompilia. VII, 7.

Guido and his Socii arrive in Rome. Secondary source. Hodell, 211; Everyman, 263.

1698, Jan. 2 Homicide of Pompilia and the Comparini. Archangeli, x, 12; Gambi, LXI, 65; Bottini, CLXXXIV, 189. At seven o'clock, according to Gambi, LXII, 66; on Thursday at seven o'clock, Secondary source, Hodell, 211; Everyman, 263; at eight o'clock, according to Add. Pamphlet, Hodell, 222, Everyman, 276.

Jan. 3 Guido and his Socii arrested at Merluzza. Secondary source, Hodell, 212; Everyman, 264; Add. Pamphlet, Hodell, 223, Everyman 278.

Jan. 6 Epiphany. Pompilia died, having made her will. Secondary source, Hodell, 213, Everyman 265.

Jan. — Trial of Guido and the Socii begins. The homicides are said by counsel to have taken place in the "current month of January." Archangeli, x, 12; Gambi, LXI, 65.

Jan. — Suit brought by the Monastery of the Convertites to recover Pompilia's estate. Probably before January 10 when Celestino, Angelo et al. made their affidavits, for Spreti, CXXX, 137, complains that they were obtained pendente lite, and the other side was not summoned.

Jan. 10 Affidavits of Celestino, Angelo et al. as to Pompilia's dying declarations and the circumstances of her death, LVII, 57, etc. Doubtless obtained by Tighetti, Pompilia's haeres beneficiatus, for use in the suit of the Convertites, but used by the Fisc in Guido's trial.

Jan. — Conti dies in Arezzo. Anon. Pamphlet, 15, CCXVII, 219.

Jan. [End] Torture of the Vigil decreed against Guido et al.

Feb. [Early part] Second stage of Guido's trial.

Feb. 9 Date of certificate of Pompilia's baptism in Second Summary of the Fisc, CLV, 159. This shows that Bottini's final argument, Pamphlet 13, must have been made shortly afterward, for he refers in it to this summary.

1698, Feb. 15 Date of certificate of the record of the criminal prosecution at Florence, v, 5.

Feb. 18 Tuesday. Guido and the Socii condemned to death by the Congregation of the Governor, Lamparelli, CCXLV, 242; Torto to Cencini, CCXXXVII, 237; Ugolinucci to Cencini, CCXXXIX, 238.

Feb. 21 The Pope overrules application for delay, and execution set for following day. See above letters to Cencini.

Feb. 22 Execution of Guido and Socii. Lamparelli, CCXLV, 242; Cover page of O. Y. B.; Everyman, XIX; Secondary source, Hodell, 213; Everyman, 265; Letters to Cencini, noted above.

[Spring] Litigation concerning the claim of the Convent of the Convertites to Pompilia's estate.

— — The Criminal Court of the Governor, after two votes, decides in favor of Tighetti, absolving Pompilia's memory. Prior to May 17, according to MS. note to Lamparelli's argument, CCLV, 251.

Sept. 9 Final decree in favor of Tighetti, as haeres beneficiatus of Pompilia.

CHAPTER II

THE OLD YELLOW BOOK AND THE LAWYERS

The Old Yellow Book is a collection of pamphlets relating to the trial of Guido Franceschini bound together in all probability by Francesco Cencini, the Florentine correspondent to whom the manuscript letters at the end were addressed by Archangeli, del Torto, and Ugolinucci. As Cencini was a lawyer, Browning pleasantly refers to him as: —

> "advocate as well
> Socius brother in the devil to match —
> A friend of the Franceschini, anyhow."

In fact as appears from Franciscus Dynus dec. 13, n. 91, Cencini was a patrician of Arezzo, Fisc of the Holy Office, and apparently a lawyer of standing in Florence.

Prefixed to the Old Yellow Book is a manuscript copy of the decree of the Criminal Court of Florence and a table of contents, which may fairly be assumed to be in the handwriting of Cencini, with an endorsement by the same, according to Browning's rendering:

> "*Romana Homicidiorum*"— nay
> Better translate — A Roman murder case;
> Position of the entire criminal cause
> Of Guido Franceschini, nobleman,
> With certain Four the cutthroats in his pay,
> Tried, all five, and found guilty and put to death
> By heading or hanging as befitted ranks,
> At Rome on February Twenty-two,

> Since our salvation Sixteen Ninety Eight:
> Wherein it is disputed if, and when,
> Husbands may kill adulterous wives, yet 'scape
> The customary forfeit."

It may be noted in passing that the regular caption of a case or decision in the law books of the time was an adjective indicating the place where the case was tried as here, Romana (causa)—a case from Rome or a Roman case, followed by the designation of the nature of the case in the genitive as "homicidiorum;" the words meaning, however, not murder case, as Browning and others translate it, but a Roman case of Homicides. Murder is a technical phrase of English law, indicative of a classification that is not the same as that of the Civil law. De Quincey humorously remarked in his Essay on Murder Considered as One of the Fine Arts, that the Latin language sinks under the very idea of murder. Interfectus est, etc., simply express homicide, and the Christian Latinity of the Middle Ages introduced a new word. Murdratus est, says the sublime dialect of the Gothic ages. The gradation of crimes in the Italian law of the period, according as they were "atrox," "atrocior" or atrocissimus," or as they were accompanied by qualifying, that is aggravating or mitigating circumstances, will be mentioned hereafter.

The eighteen pamphlets that follow include three arguments by Archangeli and three by Spreti for the defense, and a Summary of their evidence; two arguments by Gambi and three by Bottini for the Fisc or prosecution, with two Summaries of their evidence; an extrajudicial anonymous pamphlet, No. 10, written in support of Guido, with an anonymous answer to it, No. 15, written

in support of the Prosecution. After which come Lamparelli's argument in vindication of Pompilia's reputation and the Instrument of final Judgment absolving her.

All the briefs except Gambi's are headed Romana Homicidiorum, but Bottini adds "cum qualitate," meaning with aggravated circumstances, and Gambi conveys the same idea by the use of the word "Excidii" instead of "homicidiorum." Excidium, destruction or ruin, does not appear to have any technical signification; it might here be translated as "slaughter."

The briefs are addressed "Illustrissime et Reverendissime Domine," that is, the Governor of Rome, Pallavicino, but his Locumtenens in Criminalibus or Deputy in Criminal cases, Marco Antonio Venturini, actually presided, assisted perhaps in the decision of the case by the Congregation of the Governor. The endorsement of the briefs, "Illustrissimo et Reverendissimo Domino Gubernatore," means of course "Before the Most Illustrious, etc., Lord Governor," not as Mr. Hodell translates it, "By the Governor;" the preposition to be supplied is "coram." All of the briefs were officially printed and bear the imprint of the Reverend Apostolic Chamber; the anonymous pamphlets bear no imprint.

The translation of the briefs that will follow in subsequent chapters of this book will be prefaced with a detailed analysis of the arguments for and against Guido and his associates, and it would therefore be superfluous to state them here in detail. I shall, however, at this point indicate their contents in a general way. It is important to observe that the chronological order of the arguments is not the same as that in which they are

bound together in the Old Yellow Book. Mr. Hodell's statement as given in Hodell 524 is in the main correct, or at least sufficiently accurate. The arguments were delivered in two stages. Counsel for the defense opened, and after they had been answered by the counsel for the Fisc, who demanded that the torture of the Vigil should be inflicted, the Court ordered that this torture be administered in order to obtain fuller confessions, and after these had been obtained the second stage began.

FIRST STAGE OF THE TRIAL

Pamphlet 1 IX-XXIII, 11-34. By Archangeli, Procurator of the Poor, in behalf of Guido. This gives a general outline of Guido's defense, anticipating also the argument of the Fisc, including aggravating circumstances.

Pamphlet 2 XXV-XL, 27-38. By Spreti, Advocate of the Poor, in behalf of Guido and his associates. This argument also outlines the general defense with further citations of authorities, and in addition discusses the legality of the Fisc's demand for further torture, the aggravation by attendant circumstances, and furthermore, the special defenses of Guido's associates in the crime.

Pamphlet 3 XLI-XLVII, 41-46. By Archangeli, Procurator of the Poor, in behalf of Blasio Agostinelli and the other associates. This short argument is confined to a defense of the associates and amplifies Spreti's argument.

Pamphlet 5 LXI-LXVIII, 63-71. Gambi, Procurator of the Fisc, opens for the prosecution, touching lightly on the general argument and laying stress on the aggravating circumstances.

Pamphlet 6 LXIX-LXXIX, 75-86. Bottini, Advocate of the Fisc, amplifies the general argument; replies to the arguments of the defense in Pamphlets 1 and 2, and devotes much space to the proof of Pompilia's innocence. From the repeated references to matters contained in the Summary, Pamphlet 4, it would appear that the latter is a virtual appendix to this argument, and they were probably offered together.

Pamphlet 4 XLIX-LX, 49-61. Summary for the Fisc, containing:

1. The deposition of the servant Angelica, dated June 24, 1694.
2. "Attestations" of Tortelli et al. as to Pompilia's recourse to the Bishop and Deputy Governor, dated June 17, 1697, and extracts from letters by Romano (Guido's uncle) and Albergotti to Pietro Comparini. According to Archangeli in Pamphlet 8, CV, 113, these letters are incomplete and he gives some omitted passages.
3. Pompilia's "deposition" dated May 21, 1697, as to her letters to Abate Paolo. This is given more fully in Pamphlet 7, Summary of the Defense, LXXXII, 90.

4. Pompilia's letter to Abate Paolo, dated June 14, 1694.
5. Pompilia's "deposition" dated May 13, 1697, as to her asking Caponsacchi for aid. This also is incomplete and is more fully given in Pamphlet 7, Summary of the Defense, LXXXII, 90.
6. "Attestations" of Celestino Angelo et al., dated January 10, 1698, as to Pompilia's dying declarations, etc.

Pamphlet 14 CXCV-CCIV, 199-207. Responsio or reply of Bottini, Advocate of the Fisc, against Guido "and others."

This argument, after some discussion of the conflicting authorities as to the merits of Guido's defense, elaborates the aggravating circumstances. It is bound up in the Old Yellow Book as 14, but it evidently belongs at the conclusion of the first stage of the argument, and to be especially intended as a reply to Spreti's brief, Pamphlet 2. That it is subsequent to Bottini's first argument appears from a reference thereto in § In facto, CXCV, 199, and that it preceded Bottini's third argument, Pamphlet 13, appears from the reference to § Non relevante, CXCVI, 200, in § His potius, CLXVII, 175. As moreover it demands the torture of the Vigil, it belongs in the first stage of the argument, and that it

preceded No. 8, Archangeli's opening of the second stage, appears from a reference to § Solamque suspicionem, CXCVIII, 201, in § Quod pro certo, CI, 209, so there can be no doubt as to its chronological order.

SECOND STAGE OF THE TRIAL

Pamphlet 8 CI-CXXIII, 109-130. Archangeli, Procurator of the Poor, replies to Bottini's arguments in Pamphlets 6 and 14. He developes the defense elaborately with a discussion of the evidence of Pompilia's guilt, Guido's excuses for postponing his vengeance, and an examination of the aggravating circumstances.

Pamphlet 7 LXXXI-XCVIII, 89-106. Summary for Guido and his associates, containing:

1. Letter of the Governor of Arezzo to the Abate Paolo, dated August 2, 1694.
2. "Deposition" of Pompilia supplementing the incomplete extracts in Summary for the Fisc, Pamphlet 4, Nos. 3 and 5. The marginal notes printed are added by counsel by way of comment.
3. Pompilia's letter to Abate Paolo, dated June 14, 1694.
4. Pompilia's letter to Abate Paolo, dated July 19, 1694.
5. The examination of Canon Caponsacchi. The marginal notes

(printed) are added by counsel for convenience of reference, etc.

6. Letter of the Bishop of Arezzo to the Abate Paolo, dated September 15, 1694.
7. The reciprocal love letters of Pompilia and Caponsacchi, numbered 1-21. Two are each numbered 7 and No. 15 is omitted.
8. Decree of relegation of Caponsacchi, dated September 24, 1697. As the arguments of Archangeli and Spreti in the first stage of the case do not refer to the evidence in this Summary and Pamphlets 8 and 9 contain many allusions to it, it would seem that this Summary, Pamphlet 7, belongs to the second stage of the argument following Pamphlet 8, which is endorsed "Nova Facti et Juris etc., cum Summario."

Pamphlet 9 CXXXV-CXXIX, 133-144. Spreti, Advocate of the Poor, in this argument lays special emphasis on the illegality of the torture of the Vigil and discusses the confessions (thus as he claims illegally extorted), the effect of the prior decree of the Court, and the aggravating circumstances. It contains many references to Spreti's prior argument, Pamphlet 2, and in § Et in terminis, CXXXVI, 141, mentioned Archangeli's argument as given in Pamphlet 8 which was probably filed

at the same time or shortly before. Spreti's criticism of Bottini for not furnishing him with a copy of the former brief is sharply resented by Bottini in § In fine, CLXIII, 171.

[Pamphlet 10 CXLI-CLIV, 145-156. The Anonymous narrative or "Notizie di fatto," prepared in the interest of the defense, and referred to, although not in the record, by Bottini in Pamphlet 13, § Sed utcumque, CLXXXV, 191.]

[Pamphlet 15 CCVII-CCXXV, 209-226. The Anonymous reply to Pamphlet 10, or "Risposta alle notizie di fatto."]

Pamphlet 12 CLIX-CLXII, 165-168. Gambi, Procurator of the Fisc, here gives a short summing up, with references to his prior argument, Pamphlet 5. He complains in the final section that he was allowed but three hours for its preparation.

Pamphlet 13 CLXIII-CXCI, 171-196. In this "Responsio" Bottini, Advocate of the Fisc, makes his final effort, and most elaborate argument. He especially replies to Spreti's argument, Pamphlet 9, Archangeli's argument, Pamphlet 8, and several times refers to his own argument, Pamphlet 14, as having been made in the first stage of the case ("in praeterita responsione").

Together with Pamphlet 13, there was evidently filed as an Appendix:

Pamphlet 11 [Second] Summary of the Fisc, CLV-CLVIII, 159-162, containing:

1. Bond given by Pompilia to keep her home as a prison, dated October 12, 1697.
2. Certificate dated February 9, 1698, of Pompilia's baptism on July 30, 1680.
3. Pompilia's letter from the prison at Castelnuovo to her parents, dated May 3 (1697).
4. Pompilia's letter to Caponsacchi rebuking him for immodesty.
5. Extracts from the will of Pietro Comparini.
6. Power of Attorney given by Guido to his brother, Paolo, dated October 7, 1694.

Pamphlet 16 CCXXVII-CCXXXL, 229-234. Spreti in this his "Replicatio Juris," or reply, closes the argument with a short review of the main points of the case, and a final defense of Guido's associates, particularly Domenico and Francesco on account of their alleged minority. Spreti makes several references to his own prior arguments, Pamphlet 2 (the first stage) as "in praeterita" and Pamphlet 9 (the second stage) as "in praesenti." That this is the final argument appears from the reference in its first section to Bottini's argument, Pamphlet 13.

Whether all the arguments are included in the Old Yellow Book is uncertain. Ugolinucci in his letter to Cencini, dated February 22, 1698, CCXXXIX, 238, says, "I enclose the Fisc's argument, except a single response which I will send to you as soon as I can lay hands on it, that your Excellency may have the entire case." Since Archangeli and Spreti presented elaborate arguments in behalf of Guido's associates, and none of the arguments of the Fisc in the Old Yellow Book relate to them, it seems very likely, though by no means certain, that the missing "response" was devoted to their case.

We shall now speak of the language in which these pamphlets were composed. All are in Latin, except the two that are anonymous, and those parts of others that contain the testimony of witnesses, which, with the sentence of the Criminal Court of Florence, are in the vernacular. Mr. Hodell in his Translator's Note, says that the reproduction of the Old Yellow Book will suffice for those readers of Browning who are conversant with Italian and Latin; but a little later, and presumably he refers to the legal arguments, he says that the problem of translation has been rendered more difficult by the barbarity of the syntax, idiom, and diction of the original. The arguments are in truth written in the familiar colloquial Latin, which was employed by all the lawyers of the time, and was probably indeed the ordinary vehicle of all learning. It is not easy reading for those who have read classical Latin only; indeed one who has acquired also some familiarity with medieval Latin, such as is found in the monkish Chronicles and books like the Epistolae Obscurorum Virorum, Einhard's Life

of Charlemagne and Hilka's Mittellateinsche Texte, will find puzzling sentences on every page of the Old Yellow Book, while the reader who is familiar only with the English and American common law will moreover find that the technical terms of the Civil law increase the difficulties of translation.

The basis of this medieval Latin was, of course, the classical Latin of Cicero and Virgil, influenced and modified, and you may say corrupted, by the language of the Latin translation of the Bible, the vocabularies of the learned professions of the Law and the Church, and also by the idioms of the vernacular languages, which were then assuming their modern form. In the so-called Latin countries, Italy, France, and Spain, this lingua mixta had never lost its Roman tradition and was almost like the mother tongue of the educated in those countries; while in Germany or in England it was a language that was learned with greater effort. Even in England Francis Bacon thought that Latin would always be the language of all learning, and composed in it his most important books, or those that he thought the most important. His forecast was wrong, but if Latin had retained its position as a practical universal language, the benefit to mankind would have been enormous. The lawyers of the period of the Old Yellow Book at least reaped much benefit from it, for they had immediate and familiar access to all the law books of all the countries of Europe that were founded on the Roman Jurisprudence. The present-day advocates of a universal language, like Volapuk and Esperanto, might well consider the advisability of reviving the study and use of the vulgar Latin.

The problem of the translation of the Old Yellow Book is rendered still more difficult by the absence

of lexicons or dictionaries of medieval or colloquial law Latin. DuCange of course is helpful, but this great Glossary so far as the law is concerned includes little beyond the Canon law in which its compilers were chiefly interested. The smaller work of D'Arnis contains much that is not found in DuCange; help may be obtained from the great lexicon of Facciolati and Forcellini, the old editions of Littleton and Ainsworth, also from Martin's Record Interpreter and Hoare's new Italian dictionary, etc. But in many cases the meaning of the words can be discovered only by reading the authors themselves who use them, and by a comparison of texts. The use of a word in some passage of an old law book has often thrown a flood of light upon its meaning in the Old Yellow Book.

It is not my purpose to speak at length concerning the syntax and diction of the Old Yellow Book; the professed grammarian and philologist will find in these arguments and the law books cited therein an inexhaustible mine of materials. I will observe, however, that their intricate and involved style seems to be due to the fact, as I surmise, that the arguments were dictated and hastily printed with little opportunity for the correction of the manuscript or the proof; indeed Gambi, Pamphlet 12, CLXI, 168, complains that he was allowed but three hours in which to prepare his argument "currente calamo." But an analysis of the arguments will show that the sentences, although long and often parenthetical, are logical in structure; they are the product of acute, well-trained minds driven at high pressure, and intent rather upon the matter to be presented than the manner of its presentation. Browning's sneers at the Latinity of

the Old Yellow Book are undeserved. The lawyers were not trying to write like Cicero, whose orations, by the way, were elaborately polished after delivery, and as we have them are undoubtedly very different from what was actually spoken. When, however, Dr. Alexander Hill in The Browning Centenary speaks of the "slang of the dirty little courthouse rubbed shiny with the sins of Rome," we can only suppose that the learned critic wrote without having sufficiently studied the subject. The lawyers, in short, using an entirely appropriate language and method, were putting forth every effort, on the one side to convict and on the other side to acquit the accused prisoners. Their aim was strength rather than elegance, and sense rather than sound.

Any detailed analysis of the colloquial Latin would scarcely be interesting to the general reader, and I have therefore collected in an Appendix some scattered notes upon the subject, together with a glossary of unusual words, or words of unusual meaning, for reference by those who may happen to wish to consult it.

The problem of translation is always difficult, and a perfect translation is impossible. As James Howell in his Epistolae Ho-Elianae says, "translations are but as turn-coated things at best, especially among languages that have advantages one of the other * * * like the wrong side of a Turkey carpet, which useth to be full of thrums and knots, and nothing so even as the right side." I have in my translation of the arguments preferred to follow the original very literally, and with all possible accuracy. This method is especially appropriate in the translation of technical legal arguments whose whole meaning is inevitably lost

by any attempt to achieve elegance of diction in the use of expressions which although seemingly equivalent are really misleading. I have endeavored throughout by means of notes to assist the reader to understand the technical terms, and peculiarities of syntax and vocabulary. Where, moreover, my translation differs materially from that of Mr. Hodell, I have ventured to note the reasons for the divergence, and whenever the text presented any difficulty, I have called attention to it in the notes, in order that the better informed reader may make his own corrections.

The lawyers in the case were, on the side of Guido and his confederates, Archangeli, the Procurator Pauperum, and Spreti, the Advocatus Pauperum; on the side of the prosecution, Gambi, the Procurator Fisci, and Bottini, the Advocatus Fisci. Lamparelli was the Procurator Charitatis. We are accustomed in the English law and our own to have the prosecution of criminal and civil litigation, to which the State or municipality is a party, conducted by official and salaried lawyers, but in Italy and generally in the Civil law countries the defense was entrusted likewise to State officials. Their functions were not restricted to cases where the defendants were actually Pauperes, or poor persons, though it is very possible that this was originally so, and that their duties were gradually enlarged. Whatever may be said of the inhumanity of the Italian law at the period of which we write, it certainly appears in theory at least to have shown in this respect extraordinary consideration for poor litigants. As was sagely observed by Scanarolus, "he who has not his advocate and procurator lacks an important part of his defense;" and this aid was always provided by

law. The duty was indeed incumbent upon every advocate where the public office did not exist or was vacant; to refuse this aid was in the opinion of some theologians a mortal sin, and in this life was ground for what we should call disbarment.

The office of the Advocate of the Poor was important and honorable. He received a stated salary for defending those prosecuted either civilly or criminally by the Fisc, but in some circumstances when his client had means, he was allowed to accept a fee. In rank he took precedence of the Advocate of the Fisc, and although in general the clergy could not appear in the secular courts, yet the office of the Advocate of the Poor was an exception. In Rome he was selected, as was also the Advocate of the Fisc, from the ancient College of Advocates of the Aula Consistorialis; originally the appointment was made in order of seniority, afterwards by the Pope in his discretion.

The office of the Advocate of the Fisc is said by Scanarolus to have been instituted by the Emperor Adrian, and it was his business to represent the State in all matters civil and criminal, always, however, as Pius IV cautioned in his Bull 58, § 38, in accordance with truth and justice. Spreti alludes to this in § Voluissem etiam, CXXXVIII. It is related by Lord Coke, 3 Inst. 79, that when Lord Burleigh presented him to Queen Elizabeth, it was with these words, "Madam, here is your Attorney General Qui pro Domina Regina sequitur," whereupon the Queen said the form should be, Attornatus Generalis qui pro Domina veritate sequitur." Accordingly the legend on the seal of the Department of Justice of the United States is Qui pro Domina Justitia sequitur.

The Procurator of the Fisc was, like the Advocate, appointed by the Pope, and according to Scanarolus his duties were similar and his official rank was equal. The usual distinction between an Advocate and a Procurator is similar to that which exists between a Barrister and an Attorney; the latter preparing the case, establishing and arranging the facts, while the former argues the case before the Courts. So far as I can ascertain, however, this distinction did not obtain in practice, the arguments in the Old Yellow Book of Advocate and Procurator on either side seem to have been on the same basis. Perhaps Gambi might be considered as Bottini's junior colleague, and probably considerations of age were important. It would appear from § Omissa ulteriori, CCXXVII, 229, that Spreti, Advocate of the Poor, was probably much younger than Bottini, the Advocate of the Fisc, as he says that he had professed great respect for Bottini since his boyhood. Archangeli, who was Procurator of the Poor, had the laboring oar on his side, and clearly took the lead over Spreti, who was the Advocate. Mr. Hodell in his topical note 370 says that Spreti was really the official equal of Archangeli, but this view does not seem in accordance with the order of precedence given by Scanarolus, where the Procurator of the Poor is preceded by both the Advocate and Procurator of the Fisc, the Advocate of the Poor outranking all the others. The Procurator Pauperum was charged with many personal duties of daily inspection and consultation with the prisoners, making his reports at least once a week to the Advocate of the Poor.

The Archiconfraternitas of Charity was intrusted with the oversight of the prisons of the Turris Nonae (Torre di Nona), replaced in 1655

by the New Prisons to which Pompilia and Caponsacchi were taken from Castelnuovo.[1] This duty was imposed on the Fraternity by a Motus Proprius of Paul V, as appears in Scanarolus de Visitatione, Appendix § 1, cap. 7. This Fraternity had large privileges in their visitation of this and other prisons in Rome, their agents provided poor prisoners with food, wine, medical attention, and spiritual consolation including the celebration of the Mass, and buried those who died. They were represented by a Procurator of Charity and a Notary. Apparently there was no Advocate of Charity, and one would not seem necessary. Sixtus V, when Cardinal, was Protector of the Order, and when he became Pope he enlarged its powers.

The office of Procurator of Charity is described by Scanarolus in Book 1, § 8, cap. 6. He was salaried, his duties were similar to those of the Procurator of the Poor, but he was by no means the same, although Mr. Hodell translates Procurator Charitatis as Procurator of the Poor. As stated by Scanarolus, he was particularly concerned as to the prisoners with their mental solace, legal defense, bodily relief, and spiritual salvation. So far as related to their legal defense the Procurator of Charity had special charge of those cases which were of secondary importance, or where it was difficult on account of the influence of the prosecution to obtain other assistance. It would seem that when Pompilia and Caponsacchi were taken to Rome, their defense fell to Lamparelli as the Procurator of Charity, and after Guido's execution he resumed his duty as her counsel to defend his client's

[1] See as to the prisons, A. K. Cook, p. 27.

reputation against the claim of the Monastery of the Convertites.

We may derive some information concerning the lawyers of the Old Yellow Book from the writings of Franciscus Dynus and Joannes Dominicus Raynaldus. The former, whose Decisiones were published in 1713, relates in dec. 20, n. 36, that when he was a student in Florence his preceptor advised him to go to Rome and study under Bottini, who was a Marquis and Advocate of the Sacred Consistory and the Fisc, and reputed in the judgment of scholars to equal the ancient and more modern lawyers or to surpass them. In other passages he speaks of Bottini as Literatissimus, Clarissimus, and Celeberrimus. Raynaldus, a contemporary, a revised edition of whose Observationes was published just at the time of Guido's trial, says in cap. 32, supp. 7, n. 269, that Bottini was a man of the highest integrity and of most amiable traits of character. Bottini is noted in Fontana as the author of a legal treatise "super Secretariorum Apostolicorum Suppressione," but I have seen no copy.

Archangeli is mentioned by Dynus as having been one of the three Auditors of the Criminal Court of Florence, and is noted by Fontana as the author of a tract de Privilegiis Religiosorum.

Spreti is often referred to by Dynus as a most distinguished advocate, and in dec. 59, n. 24, Dynus says that Spreti on account of his piety and other virtues, was about to be promoted to a higher office. Raynaldus in his posthumous Vota speaks warmly of Spreti's character and learning, and Bassanus in his Theorica-Praxis Criminalis I, cap. 15, n. 64, styles him as insignis reorum advocatus.

Raynaldus in his Observationes ad cap. 2, supp. 2, n. 1, gives a flattering account of Gambi, whom he knew at Ferno and also at Ravenna, his native city. Gambi, he says, fulfilled with great praise judicial office at Genoa, Lucca, Ravenna, Rome, and Bologna, and was appointed Procurator General of the Fisc by Innocent XII. He commanded affection for his courtesy, gentleness, and uprightness. In cap. 34, § 12, Raynaldus inserts the "very learned" opinion of Gambi upon the question under consideration, and in his posthumous Vota 175 inserts a case where the counsel were Gambi and Spreti, whose arguments are given in full. F. M. Constantinus, de officio Procuratoris Fiscalis, n. 431, says Gambi was distinguished not less for learning than for integrity.

Dynus in dec. 48, n. 58, says that in a case arising before him, he had recourse for an opinion to Venturini, then an Auditor or Judge in Bologna; he styles Venturini "promentissimus," and mentions that he officiated as Governor of Rome for twenty years. Venturini is stated to have drawn the Processus Fugae, § Ex processu, xxv, 27, Ch. VI, sec. 5.

The lawyers concerned in the Old Yellow Book were, therefore, experienced men, learned in their profession and of high standing; they were charged with important official duties, and a careful and unprejudiced examination of the record will show that they performed those duties with zeal and conscientious industry. It is painful, therefore, to read the books "Dominus Hyacinthus" and "Johannes Baptista Bottinius" in The Ring and the Book. Browning had the Old Yellow Book before him, claimed to have mastered its contents, and

that he had read it with sufficient care to acquaint himself with many of its facts in detail is shown in his poem, yet he has deliberately treated these men with contempt and ridicule. Archangeli is portrayed as a silly, conceited pedant preparing his argument with a mind divided between his curly-headed boy, of course a figment of Browning's imagination, and the fried liver with fennel and parsley, and the lamb's fry that he expects to have for dinner. Interspersed with his ejaculations on these subjects, and caustic comments on his opponent, Bottini, are shreds and patches of Latin, some taken from the Old Yellow Book with disconnected references to some of the points of law advanced by the real Archangeli, including what Browning called "Gracchus' Code," which did not exist at all. The next book, Juris Doctor Johannes Baptista Bottinius, is much the same, though perhaps containing less nonsense. In both books, however, just about one half of the text has really something to do with the subject, the other half is frivolous or stupid, especially when Browning indulges in a certain kind of heavy humor which in some places is actually distressing to read. Yet such is the hypnotism of a great name, that many Browning readers profess to enjoy it. Dowden indeed is frank enough to say that the birthday feast and the fried liver are a weariness to the flesh, and Birrell thought these books uninteresting, but Chesterton says that the introduction of them is one of the finest and most artistic strokes in The Ring and the Book, and Stopford Brooke averred of Dom. Hyacinthus, that he did not know of anything better done and more amusingly. Mr. Brooke finds in these books wit in its finest brilliancy and analysis in its keenest veracity.

Marzials with a little less enthusiasm says, that all this law business, assuming that it was worth while to do it at all is done with a most admirable cleverness. Mr. A. K. Cook, p. 160, gives some other criticisms, but even he thinks the speeches display brilliant wit and keen analysis and, strangest of all, the fidelity of Browning to his source, flavored by his own delicious irony.

Browning, of course, is followed by the great mass of critics and editors; and those who wrote before the reproduction of the Old Yellow Book should be pardoned for knowing no more than Browning saw fit to tell them, and naturally enough they thought Archangeli and Bottini to be fools and pedants. But this excuse cannot be urged in behalf of those who have since the publication of the Old Yellow Book repeated these undeserved criticisms. Even Sir Frederick Treves whose Country of The Ring and the Book is one of the most interesting and valuable contributions to Browning literature, that have recently appeared, joins in the general abuse of the lawyers and everything connected with the law in the Old Yellow Book. Mr. Hodell, to whose enterprise and industry we are indebted for the facsimile reproduction of the Book, and who has translated it, continually refers to what he calls the "sophistries of the lawyers," meaning, as of course he must, not Browning's travesties of the arguments, but the originals themselves. "The lawyers," he says, p. 235, "had no other concern than to sophisticate the truth for their own ends. The human element, the spiritual significance, and even the sensational interest in a barbarous story, had not attracted their minds." And again, p. 239, "The truth of the tragedy, and the real claims of justice, are of

little interest to the contestants. Every energy of the defense is devoted to the establishment of the plea of *honoris causa*, while the prosecution is equally insistent upon the illegitimate delay in taking vengeance, and upon the five technical aggravations of mere murder. The whole is flooded with precedent upon precedent. They show much acumen and no heart, and justify Browning's words as to 'the patent truth extracting process'." (Ring and the Book I, 114.) And again, p. 241, "These lawyers evidently had a job on which to exercise their professional cunning, and they have little conviction as to the rights or wrongs of the case."

The accusation of sophistry is entirely without foundation, if by sophistry we should understand an intentionally deceptive argument or reasoning. The lawyers seem to me to have presented their respective sides of the case with fairness to the Court and to one another. It is the duty of a lawyer to lay before the court all the evidence that is favorable to his side and to suggest all the principles of law, statutes and decisions, that upon the facts as presented, may affect the judgment of the Court. He must not, of course, make any misrepresentations to the Court, but he is entirely justified in asking for a favorable decision on any ground fairly arising in the case, whether he himself regards it as controlling or not, for it is the business of the Judge to determine what are the pertinent facts and what the controlling principles of law. It must further be borne in mind by any serious and unprejudiced student or critic, that the system of law that ruled in Italy at the time of the Old Yellow Book was very different from our own, and that an argument which would seem to

us to be weak or even frivolous, may have had then a potent force.

So far as concerns the reproach that the lawyers in the case displayed no "human sympathy" in their conduct of the case, it should be said that as a general rule no matter what the lawyer's emotions may be, he should not be controlled by them in his conduct of the case, and as another general rule that the less display he makes of them, the better are his chances of success. Moreover, it will be remembered that this trial did not take place before a jury, where doubtless more sensational methods are more frequent and effective. That, however, our lawyers in the Old Yellow Book showed no "human sympathy" at all is not borne out by a dispassionate examination of their briefs. They exhibited as much of that dangerous quality as it was proper and prudent. The Fisc certainly inveighed strongly against the defendants for their horrid slaughter of the Comparini family, while Guido's counsel showed no little feeling in depicting their client's wrongs. To have overdone it would have injured their case; and it would have been easy to overdo it. Readers of A Modern Instance may remember the ridiculous court scene near the end of the book, intended as its climax. Mr. Howells does not shine as a legal novelist, and in this "modern instance" has well illustrated the point. Squire Gaylord in undertaking to act as his daughter's lawyer in her divorce case, and to "plead for her" (as the phrase goes) assumed to do something that he had no business to attempt, and his emotions and "human sympathy" not only ruined his case, but caused the paralytic stroke from which he never recovered.

My meaning may perhaps be illustrated by what we see every day in the practice of the medical profession. When a surgeon undertakes a critical operation on which depends his patient's life, he divests himself, as far as he may be able, of the emotions that would agitate the mere looker-on and operates with a mind as impersonal and keen as the scalpel in his hand. To give way to his "feelings" and the "human interest" would be a professional fault. He must exercise his judgment and technical skill for the preservation of his patient's life, and everything else is subordinate. So with the lawyers. On the one hand the prosecuting attorney endeavors to vindicate the law and enforce it against the criminal; on the other side the prisoner's counsel endeavors to marshal the cold facts that are in his favor, and it is the duty of both to produce before the court the statutes and precedents that define the crime, and should be followed, to ensure the uniformity of justice. Naturally both sides strive for professional success, they would not be human if they did not, just as the surgeon not only aims to save life or limb, but also to perform a difficult operation in a skilful manner. Professional zeal must not be mistaken for indifference or lack of feeling. Thus the late Dr. John B. Murphy, the well-known surgeon of Chicago, on page 703 of the August 1914 number of his Clinics said: "The last case I operated also had both hips stiff. He was a thin little fellow — so thin one could almost see through him. Those are the cases which we enjoy doing;" and on page 770, when exhibiting a case of Paget's disease, an especially virulent species of cancer: "Look at it! Here is a beautiful picture of the rather more advanced stage." So

Dr. Charles Spencer Williamson in the first number of the Medical Clinics of Chicago, p. 68, showing a skiagraph of a case of chronic gout with degeneration of the bone: "Look at the beautiful infiltration in the thumb — as pretty as anything you can think of; look at the phalanx, — you can see as pretty and typical infiltration as one ever gets to see."

These physicians were not cold-blooded or cynical, but were men imbued with love for their profession, sympathetic with their duties, alive to the "human interest" of their cases, anxious to do their full duty in alleviating human suffering, but at the same time taking a very keen professional interest in those cases. Nothing worse than this is true of our lawyers in the Old Yellow Book. That Archangeli moreover appreciated his responsibility as a conscientious lawyer would, who has lost a case that he felt might have been won, is shown by his letter to Cencini: "Confessing my own shortcomings, I cannot deny feeling infinite regret, as I attribute the whole outcome to my inability in offering the valid grounds."

CHAPTER III

THE LEGAL SYSTEM AND THE COURTS OF ROME IN THE TIME OF THE OLD YELLOW BOOK[1]

Without elaborating the material too minutely and merely in order to give the English reader a few general ideas upon the subject, I shall in this chapter give a brief description of the lawyer's armamentarium in the days of the Old Yellow Book, and of the courts where the legal system was administered.

The foundation of the law and its supreme authority was, of course, the Corpus Juris of Justinian containing the Institutes, Digest, Codex, and Novels. Any applicable text was decisive, and if no text could be found exactly in point, inferences more or less direct and not infrequently very strained, were drawn from others, just as the theologians and ecclesiastical lawyers performed similar feats in biblical exegesis.

Justinian became Emperor in 527 and almost immediately appointed his commission to collate the statute law or Codex, which went into effect on April 16, 529. Four years later there followed, on December 30, 533, the Institutes and the Digest or Pandects, the latter in fifty books composed of extracts from the writings of the Jurists. The Code was then revised, December 29, 534, and was

[1] Some of the material in this chapter may be found in an article by the present writer entitled Notes upon Continental Legal Literature in 69 Univ. of Penna. Law Rev. 121.

supplemented by the series of Novels until Justinian's death in 565. Gibbon in the 44th Chapter of his Decline-and-Fall-Off-The Rooshan Empire (as Mr. Boffin would call it) has given a lively description of Justinian's work, which has never been superseded, but those who wish to read a more modern and scientific account may find it in Roby's Introduction to Justinian's Digest.

The fifty books of the Digest (except books 30-32 De Legatis et Fidei Commissis, which are simply divided into laws) are divided into Titles, varying in number, and designated by their rubrics; thus the titles most frequently cited in the Old Yellow Book are from the 48th book of the Digest, Title 5, Ad legem Juliam de Adulteriis Coercendis; and Title 8, Ad legem Corneliam de Sicariis; and from Book 9 of the Codex, Title 9, Ad legem Juliam de Adulteriis. Each title of the Digest is composed of extracts from the authorities with a reference to its author, and his treatise, and similarly to the laws in the Codex are annexed their sources and generally their dates. These extracts or laws are also divided into paragraphs for convenience of reference, and in modern times book, title, law, and paragraph and sections of paragraphs are cited by numbers either arabic or roman, but formerly various other methods were used, which to us seem very confusing, though the medieval lawyers were so thoroughly familiar with the texts and rubrics that it was generally sufficient to refer to them alone. Roby in his Introduction to Justinian's Digest mentions the various schemes of citation, but it will be enough for our purpose to explain the method employed in the Old Yellow Book, which was similar to that used by the glossators. As in the early copies of the Digest and Codex the

paragraphs of the various titles were not numbered, or their designation by number varied, the custom was to refer to the title and the first words of the law and of the section. Thus the Lex Julia de Adulteriis of the Digest was Book 48, title 5, but it was cited simply by its name with the addition of ff. the abbreviation of Pandects. To illustrate from the Old Yellow Book. On page 288, § Magnum quidem, is the citation l. Si adulterium cum incoestu 38, § Imperatores ff. ad leg. Jul. de Adulteriis. This means Lex Julia de Adulteriis (Book 48, Title 5 of the Digest), law No. 38, beginning Si adulterium, etc., paragraph beginning Imperator Marcus Antoninus et Commodus (briefly Imperatores). According to the common modern notation this would be Dig. 48, 5, 38 (or 39 in the textus receptus). Similarly the citation following this, l. marito 24 ff. eod., is Dig. 48, 5, 25 [24], where "eod." signifies "the same title." And likewise leg. or l. Gracchus C. ad. l. Jul. de Adulteriis is Cod. 9, 9, 4, the celebrated "Gracchian law" of Browning and his commentators, beginning "Gracchus quem Numerius."

Of equal importance with the Corpus Juris was the Gloss. Every line and almost every word of any importance were elaborately explained and illustrated. The chief of the glossators was the celebrated Accursius (the pupil of the distinguished Azo) born in Florence. He became a professor at Bologna, and an account may be found of him in Colquhoun's Roman Civil Law and in Bayle's Dictionary. Accursius composed a "perpetual commentary" on the whole law which gained such general reputation that the former glosses were superseded. The dates of his birth and death are disputed, but if we say that he was born in 1201

and died in 1279 (though some claim that he was born in 1182 and died 1260) it will be sufficiently exact for our purpose. In either case he lived seventy-eight years, long enough for his herculean task and longer than pleased Rabelais, who makes Pantagruel say, in comparing the Corpus Juris to an elegant garment, that "there are no books in the World so fine, so ornate, so elegant, as the Texts of the Pandects, but the bordering of them, to wit, the Gloss of Accursius, is so filthy, scandalous and mean, that it is nothing but Dirt and Villainy."

The writers, however, who followed Accursius took as much pains to explain his Gloss as to comment on the text of the law. Bayle in his article on Accursius quotes Raphael Fulgosius as saying that the civil lawyers claimed they would rather have the comment than the text favor their opinion. Just so Browning said:

> "Grant I have mastered learning's crabbed text,
> Still there's the comment."

De Caevallos, a comparatively late writer, in his Speculum Aurem, Pref. 64, says the Gloss is the idol of the Advocates and it is better to stand by the Gloss than to form new opinions.

The glossed edition of the Corpus Juris constitutes in itself an enormous and unwieldy body of law. To quote John Hill Burton: "These are the terrible folios of the scholastic divines, the civilians, and the canonists, their majestic stream of central part, overflowing with rivulets of marginal notes, sedgy with citations. Compared with these, all the intellectual efforts of our recent degenerate days seem the work of Pygmies; and for any of us even to profess to read all that some of these

indomitable giants wrote would seem an audacious undertaking."

Next followed the Post-Glossators led by Bartolus [1314-1357] whose commentaries were accorded equal or even, in the opinion of some, superior authority to that of the Gloss. Among these later commentators may be mentioned Paulus de Castro, or Castrensis, Jason de Mayno, Alciatus, Baldus de Ubaldis, and Philippus Decius. There were many others, but all of them together were merely the foundations upon which later lawyers, influenced by the revival of learning in the 15th and 16th centuries and stimulated by the general introduction of printing, erected a stupendous superstructure.

The old glossators and commentators did much to further the scientific study of the Roman law; they established the text of the Corpus Juris, and by their exegesis assisted the writers of the later centuries to understand it. Their work was analytic, rather than historical, or comparative; in fact they had not the necessary apparatus for accurate historical or comparative investigation, and their commentaries naturally included much that can now be seen to be either erroneous or useless. But Oh! their volume! As Swinburne on Wills says in his Preface: "Great and wonderfull is the number of the manifold writers of the Civill and Eccleastical Lawes, and so huge is the multitude of their sundry sorts of books; as lectures, counsels, tracts, decisions, questions, disputations, repetitions, cautels, clausules, common opinions, singulars, contradictions, concordances, methodes, summes, practicks, tables, repertories and bookes of other kindes (apparent monuments of their endlesse and invincible labours) that in my conceit,

it is impossible for any one man to read over the hundredth part of their workes, though living an hundred years, hee did intend none other Worke."

Confining our attention to the principal works cited or referred to in the Old Yellow Book, they may be classified as follows:

1. Commentaries on the Corpus Juris or parts thereof, such as Paulus de Castro, Bartolus, Joannes de Platea on the Institutes, Matthaeus de Criminibus on Books 47 and 48 of the Digest; Stephanus on the Novels, etc.

2. Commentaries on other Codes of Laws, such as Raynaldus, Observations on the Bannimenta or local ordinances of Bologna, Gomezius on the Leges Tauri; de Zaulis on the statutes of Faenza; Muta on the Capitula of the Kingdom of Sicily. Writers of this class taking their local laws as texts, embraced in their annotations general discussions of their subjects forming really treatises of comparative law.

3. Treatises or Tractatus upon the Practice or Theory of the law or some branch of it, either Civil or Criminal or Canonical. Their value as authority depended of course upon the reputation of the writers. Such for example were Angelus, de Maleficiis; Bossius, Tractatus Varii; Caepolla, de Servitutibus; Decianus, Tractatus Criminalis; Carpzovius, Practica Nova; Mascardus, de Probationibus; Menochius, de Praesumptionibus and de Arbitrariis; Paulus Zacchias, Quaestiones Medico Legales; Johannes Zeithopf de Jure occidendi prehensum in adulterio is a monograph upon the question involved in the Old Yellow Book, and cited in it by the Fisc. Sometimes these treatises bore titles intended to be attractive, as the Sylva

Nuptialis of Nevizzanus, the Pugna Doctorum of Danza; Speculum in the sense of a handbook was often used in various countries and languages. Its connection with the literal mirror is obvious, the statement of the law appearing in the book as in a mirror, e.g., the Speculum Juris Canonici of Peter of Blois; the Sachsenspiegel; the Speculum Aureum of de Caevallos; the Speculum Juris of Durandus, and in England the Mirror of Justices.[2]

4. Quaestiones. These were discussions of particular points or questions of law including suppositious or moot cases, as those of Farinacius and Ancharanus. Sometimes such works were called by their authors, Conclusiones as Berlichius; or Resolutiones as Caballus, or Conciolus; or Sententiae as Clarus; or Observationes as Gaill. Gratianus preferred the title of Disceptationes Forenses and his preface mentions also Consultationes, Interpretationes, Memorabilia, etc. Disceptatio he says means Cognitio veritatis and therefore he uses it.

5. Consilia or Responsa. These were arguments made or opinions given by counsel in cases arising in their practice; such for example as those of Bertazzolius, Bursatus, Paulus de Castro, Cravetta, Farinacius, Menochius, Rolandus a Valle, Surdus, and Giurba. It seems very surprising to us that the arguments of counsel in one case should be quoted as authority in another, and yet throughout the Old Yellow Book, and in all the legal literature the Consilia of distinguished lawyers are cited with about the same frequency and as carrying the same weight as are the Quaestiones and Decisiones. It may be suggested as an explanation

[2] See article on Speculum and Mirror by James Williams, 26 Law Mag. & Rev. 157.

that counsel were regarded as the successors of the old Jurisconsults to whose opinions Augustus gave official authority, Dig. 1, 2, 35, § 49, cited by Roby in his Introduction to Justinian's Digest 102, who says: "Whether such opinions are obtained by the parties and presented by them to the Judges, or obtained by the Judge himself; whether all were consulted as a body (which is not probable) or any one or more as the parties chose, we do not know." As Dr. Muirhead points out, Historical Introduction to the Private Law of Rome, p. 292, the judges were then private citizens, and not necessarily learned in the law. They were therefore asking for and acting upon the opinion of experts, and the patented Jurisconsults were like Kings' Counsel, bound to give their professional assistance and counsel to the sovereign power. According to Muirhead this practice expired in the third century, yet it may be that in a similar fashion counsel in these later times who gave opinions to their clients or argued in their behalf were regarded as strictly speaking officers of the Court, assisting it in the discharge of judicial duty, as Spreti urges in § Voluissem etiam, CXXXVIII, 143, citing Raynaldus in his Observationes cap. 19, § 1, n. 156. When therefore counsel in argument laid down a statement of the law, although it was enunciated with special reference to his client's case, he was considered to have given a general opinion that should apply in all similar cases. Indeed the published consilia were very often formal considered judgments prepared at the request of the Court or sovereign.[3] Mascardus

[3] We are reminded of the Merchant of Venice, where the Duke sends to Bellario, a distinguished Doctor, for his opinion or consilium, who being unable to come by reason of illness, sends as

indeed remarks, de Probationibus Conclus. 426, n. 26, in special reference to the proof of custom: "More credit should be given to a Doctor in his lectures about custom, than in his Consilia, for Doctors in writing strive for the truth, more than they do in advising, for in lecturing bias and desire for money are absent, which dominate the minds of men, particularly Doctors, in these times of ours. If there is any one who does not see this, I think he sees nothing, for this is so apparent as to need no further proof."

Judge Wessels of South Africa, in his admirable History of the Roman Dutch law, 241, gives a most interesting account of the old Consultatien in Holland, as having a foremost place in the legal literature of that country. There they played a very important part in the development of the Roman Dutch law, though it would seem that they did not have there as great authority as the Consultationes and Responsa certainly possessed in Italy, where the popular collections of Consilia and Quaestiones were often republished and edited with "notes," "observations," and "additions." Sometimes these notes by distinguished lawyers obtained greater authority than the originals.

6. Decisiones or Vota. These were decisions or judgments of the Courts in actual cases, generally including a more or less complete statement of facts, and sometimes accompanied with the arguments. The decisions might be selected from several jurisdictions or those of a particular court. Thus we have the decisions of Berlichius (general

his substitute Balthazar, or rather Portia, who is thus to the glory of her sex, enabled to carry off undying laurels. See John T. Doyle on "Shakespeare's Law, The case of Shylock," in Appendix to Furness's Variorum Edition.

collection); Farinacius (Rome); Chartarius (Milan); Dynus (Umbrian courts); Grammaticus (Naples); Surdus (Mantua); Sanfelicius (Naples). The decisions of the Sacred Roman Rota from 1558 to 1683 were published as the Decisiones Recentiores, and there were numerous other collections, the volumes sometimes including only the decisions of a single judge of the Rota. Matthaeu et Sanz styled his collection of decisions of the Spanish Supreme Aula and Senate of the New World, Tractatus de Re Criminale, the cases being denominated Controversiae. Marta compiled an ambitious but disappointing Digesta Novissima, or Universal Digest of decisions.

It is generally supposed that the Civilians reposed little reliance upon the decisions of the Court as authorities in similar cases, and that this is one of the principal distinctions between the systems of the Civil and the Common law. Of course in France since the Code, articles 5 and 1351 being particularly applicable, this is true, and so also in the other civil law countries which have adopted this principle of the Code Napoleon, although even there the value of decisions as authority is the subject of much discussion. But in Italy in the seventeenth century and much later, however it may be at the present time and notwithstanding the texts, Cod. 7, 45, 13 and Dig. 1, 18, 12, decisions were quoted in argument and in other decisions very much as they are now with us. The judgments of the Sacred Roman Rota especially were regarded with profound respect; the decisions of the courts of the Italian States and those of Spain were held in high esteem, as were also to a considerable extent those of the French and even of the German courts. In all these countries the

law had the same foundation, all the courts professed to base their decisions on the Corpus Juris, except as modified by local customs and laws. The catholicity of the Civil jurisprudence was most noticeable and must have exerted a tremendous influence. Thus some of the noted criminalists were Carpzovius the Saxon, Clarus the Italian, Gomezius the Spaniard, Damhouderius the Belgian, Matthaeus the Dutchman, Aerodius the Frenchman; the works of these authors were cited in every jurisdiction as high authority. Naturally among the Courts the Roman Rota enjoyed the highest prestige; its jurisdiction being in a sense universal, so its decisions were regarded as magistrales or authoritative; de Caevallos in his Speculum Aureum, Pref. 26, says they were of even greater authority than the "communis opinio" of the Doctors, and Conciolus, Alleg. 95 and 97, says that it is impious to doubt them.

7. The Corpus Juris Canonici formed, like the Corpus Juris Civilis, an enormous bulk of law, which was glossed and commented upon in like manner. A detailed description of it would be here unnecessary, but it may be observed that while it was not authority, strictly speaking, in the secular courts, yet it was freely used for illustration, and its principles were followed where the Civil law was inadequate, just as our own Common law will occasionally borrow from the Civilians. On the other hand, where the matter was defined by the Civil law and not by the Canon law, the Civil law was followed by the Ecclesiastical courts; if they differed, the Civil law was followed in the courts where the land was not held by the Church, but the Canon law prevailed in terris Ecclesiae: though if the question concerned some matter of

conscience or sin, then even in the Civil courts the Canon law was followed. The Canon law and the leading commentators upon it were frequently cited in the Old Yellow Book, though as I have pointed out, Guido's trial was conducted in the secular court, and the law administered was the general criminal law.

8. The Communis Opinio Doctorum. The common or general opinion of the authorities was invoked in all doubtful cases, just as our courts are apt to follow the "weight of authority." This doctrine is based upon the effort to extract from an unwieldy mass of inconsistent decisions or opinions some general rule, and to bring about in this way uniformity in the law. Some authors even determined doubtful points according to the opinio communior. Thus Cyriacus, Controversiae Forenses 353, enumerates forty-two authorities on one side of the question (one of inheritance) and fifty-eight on the other, and says that from this recital of the authorities it appears that the latter is the more common. De Caevallos of Toledo, in his Speculum Aureum collected numerous contested questions, where the proponents of each side claimed to be supported by the Communis Opinio. Reliance upon the general opinion of the profession is not confined to the civil law. Sir Edward Coke held it to be good authority, and other references may be found in Ram on Judgments p. 12.

9. Texts from the Bible were frequently cited as authority, and arguments were adorned with illustrations drawn from the writings of the ancient philosophers and poets, such as Aristotle, Plato, Ovid, Martial, and Horace.

10. As a tenth source of authority may be added the legal maxims, regulae juris, or brocardia

(or brocardica), of which the classical and medieval writers were especially fond. They have been, however, used by English courts and lawyers as well, and many are now in common use. Coke's writings abound with them, and I suspect that he invented a goodly number. These short, pithy sentences intended to express or emphasize a general principle of law, like popular proverbs in common conversation may legitimately be used, with proper caution, to point the argument, and adorn the opinion, for in many cases they do really present general rules of law or public policy in a crystallized form. Professor Goudy in his paper on Two Ancient Brocards (Essays in Legal History 1913) well says that brocards or maxims have a certain utility in concentrating ideas and stimulating the memory, and the reader may be referred to Ram on Judgments, p. 14, for some interesting comments on the subject.

In reading these old books, one is struck with the painstaking industry of their writers in the collection of precedents and the minuteness of detail with which every phase of the subject is examined. This renders their writings appalling in volume. We note an unfortunate absence of clear definition, or theoretical criticism or of historical discussion. Everything is subordinated to authority. Yet even if we make due allowance for the progress of the scientific development of the law, the same faults appear in the legal treatises at the present time; how often are they mere digests of indigestible cases! Certainly when we see as we often do in our law books a doubtful question dismissed, after lengthy footnotes crammed with cases, with the phrase "the trend of authority" or "the weight of the modern decisions seems to be, etc.,"

we may well be reminded of the ancient reverence for the "communis opinio." Some, however, of these old authors possessed the scientific temperament coupled with literary ability such as, to mention here only one, Matthaeu et Sanz in his Controversiae or de Re Criminale. So in the common law the fruitful scientific treatises are rare. There are not many books on our shelves like Stephen on Pleading, Benjamin on Sales, Pollock on Torts, Story on Equity Pleading, Wigmore on Evidence. Yet this is not surprising. Most law books are intended for the busy practitioner, who is not looking for a theoretical discussion of his subject, but for a precedent that will fit the case he is soon to argue. An authoritative precedent in point saves both counsel and court much labor in argument and decision; and this is right enough, for such is the object of reporting cases.

Another characteristic common to our own writers and to these civil lawyers is the quotation of authorities evidently at second hand. The same bunch of familiar citations appears over and over again, even in the same order, each subsequent writer being added in turn as an additional "authority" even if he did nothing more than copy what had already been written, and add his own name to it. This is what Burton in the Anatomy of Melancholy called pouring out of one bottle into another. There is room for suspicion also that some of the writers did not disdain the familiar device of availing themselves of the labors of other less distinguished men. The life of no one man indeed would seem to suffice for the production of these Gargantuan folios of decisiones, consilia, quaestiones, and tractatus published under

a single name, and here again we are not without modern instances.

We now turn to the Courts whose business it was to put all this legal apparatus to practical use.

Italy at the time of the Old Yellow Book, and previously, was divided into numerous states, whose political history is most confusing. The States of the Church with Rome as the capital city, and subject to the Papal power, extended northward to Ferrara and to the Po, including Bologna and Perugia. Naples, forming the southern part of the Italian peninsula, Sicily, Sardinia, Venice, Milan, Tuscany (Florence), Modena, Parma, Piedmont, etc., were independent in their judicial systems. In general each had its Supreme Court or Court of Appeal variously denominated as its Senate, etc., and inferior courts of varying jurisdiction; in many cases the district or local court was called the Magna Curia Vicariae, or High Court of the District.

The Supreme Court of the Ecclesiastical State, the Sacred Roman Rota, a tribunal of the highest dignity and importance, was composed of twelve judges or Auditors appointed by the Pope. The meaning of Rota is variously explained by Du-Cange, Bernino, and others; it was so called either because the judges were originally seated at a round table, or because the cases were heard by them in turn or because the porphyry pavement of the court room or camera contained the figure of a wheel, or again because of the universal jurisdiction of the court in matters ecclesiastical. Sometimes the Rota is referred to as the Sacred Consulta or Supremus Concessus, as will be observed in several sections of Spreti's argument in Pamphlet 2.

The jurisdiction of the Rota was both beneficial or Ecclesiastical and profane or Civil, and was certainly in general, if not exclusively, appellate. Its ecclesiastical jurisdiction was universal, its civil jurisdiction extended over the Papal States. On account of the catholicity of its ecclesiastical jurisdiction its membership was not exclusively Roman or Italian, but as was said by Bernino p. 48 "ex diversis gentibus et in gratiam Principum illarum," it would have for example as Lunadoro (1664) and Bernino (1717) state, one German, one Frenchman, two Spaniards, and eight Italians, including three Romans, and one member each from Bologna, Ferrara, Venice, Tuscany, and Milan. Josephus Molines, the Judge of the Rota to whom was assigned the appeal of the Comparini from the decree of Auditor of the Camera Thomatus, was a Spaniard.

In its own jurisdiction the decisions of the Rota, it being the "Totius Christiani Orbis Supremum Tribunal," were not merely authoritative but final, but in other jurisdictions its opinion was recognized as high authority just as the decisions of the Supreme Court of the United States in non-federal cases are regarded in our State Courts, which are of independent status.

The Reverend Apostolic Chamber (Rev. Cam. Apos.) was composed of the Cardinal Camerlengo, the Governor of Rome, as Vice Camerlengo, the Treasurer General, the Auditors and President of the Chamber, the Advocate of the Poor, the Advocate of the Fisc, and the Commissarius of the Chamber, with twelve clerks. Its jurisdiction included primarily all matters concerning the Fisc, and the Ecclesiastical revenues from leases, rents and feuds, accounts of officials, etc.

The Governor of Rome exercised both civil and criminal jurisdiction. In the former he was represented by two deputies or Locum tenentes, in the latter by one only. The name of the Governor of Rome in the time of the Old Yellow Book was Pallavicino and his deputy in Criminalibus was Marco Antonio Venturini, who presided at the prosecution of Pompilia and Caponsacchi and subsequently at the trial of Guido and his associates. Under the Governor was the Bargello or sheriff with three hundred police officers or sbirri.

The Auditor of the Camera also possessed the ordinary and extensive jurisdiction of the Curia Romana, both civil and criminal, and like the Governor exercised it through two deputies for civil business and one for criminal cases. In the time of the Old Yellow Book the action for annulment of dower was brought by Pietro Comparini before Thomatus as Locum tenens of the Auditor Camerae, whose name was Domenico, and not A. C. Thomatus (Hodell note 262), A. C. being the abbreviation of his office. It is stated by Spreti, § Absque eo, XXXIII, 33, that his decision was approved by the Supreme Tribunal of the Signatura Justitiae. Mr. Hodell's note says that this was a High Court and a tribunal of last instance or ultimate appeal, but this cannot be correct, as the Rota was the highest court of appeal, and in fact the appeal was actually taken to that court. Hoare's Italian Dictionary says that the Signatura di grazia e giustizia is a Supreme Ecclesiastical Court at Rome, consisting of seven Bishops under the presidency of a Cardinal, but this must refer to its present constitution. It would appear that in the time of the Old Yellow Book the Signatura Gratiae et Justitiae was not a

regular court of appeal, but that it merely exercised a sort of supervisory jurisdiction, concerned rather with the regularity of the proceedings, and possessing the power of moderating decrees. Some of the Bulls relating to it are those of Paul III, Const. 23, 1 Mag. Bull 732; Alexander VII, Const. 91, 3 Mag. Bull 313; and Innocent XII, Const. 48, Collect. Innocent XII, p. 193.[4]

I will add a final word in reference to the punishments employed in the administration of the Civil law. The punishment of death was the extreme penalty, the ultimum supplicium of the law, and in early times might be by burning or beheading, or in the case of slaves, crucifixion; sometimes criminals were condemned to fight with wild beasts, butchered to make a Roman holiday. In the Old Yellow Book, death was inflicted by beheading as in Guido's case, while his confederates were hung. Sometimes in these latter days the death penalty was aggravated by cutting the body to pieces; in the case of heresy and other very serious crimes burning was employed.

Capital punishment, however, was not necessarily death. Any sentence that involved the loss of caput, i.e., the deprivation of liberty, citizenship and family rights, was capital, and was denominated maxima, media or minima according to extent. The sentence of condemnation to the mines, *in metallum* or *in opus metalli*, meant the hardest kind of labor for life, and this continued to be a favorite form of sentence during the Middle Ages; in Spain the quicksilver mines were worked by convicts. Perhaps the most severe form of forfeiture of citizenship was the interdict, *aquae et*

[4] See Franciscus Antonius Vitale, De Jure Signaturae Justitiae, Rome, 1756.

ignis interdictio, which practically was banishment from civilization; the unfortunate man was like Cain, but without Cain's protection. The medieval equivalent was the decree of bannimentum, corresponding with outlawry in English law. Deportation to an island was a modification, and carried with it the confiscation of property. In the time of the Old Yellow Book the punishment of the galleys succeeded to deportation. Raynaldus Vota 14, n. 3.

Of the non-capital punishments relegation or exile was perhaps the most serious, being a prohibition against entering one province or Rome or any particular district, either for life, or generally for a limited term. Sometimes the sentence was a relegation to an island, but then the island was a pleasanter island than that specified in the decree of deportation. Relegation did not involve the loss of property. In the Old Yellow Book, Caponsacchi was relegated to Civita Vecchia for three years. Other non-capital punishments were flogging or beating with sticks, pecuniary fines, or degradation of rank. Imprisonment as a punishment was infrequent in the Roman law, and imprisonment for life was not sanctioned. In the words of Ulpian, Dig. 48, 19, 8, 9, "carcer enim ad continendos homines, non ad puniendos habere debet." So in later times imprisonment was employed for short periods and minor offenses, and debtors were imprisoned until they had paid their debts, but as a general rule, a prison was merely a place of detention before trial.

CHAPTER IV

THE EXAMINATION OF PERSONS ACCUSED OF CRIME AND THE SYSTEM OF TORTURE

According to the regular course of procedure in criminal cases the defendant was cited to appear and answer, or where his flight might be anticipated, he was arrested and brought before the Judge for interrogation or examination.[1] This examination should be made as soon as possible, the defendant being brought for that purpose e tenebris carceris in lucem[2] in order that if his innocence appeared he might be discharged. The notes of the examination were taken before a notary, and as we would say filed of record,[3] and while some defendants readily confessed everything, others endeavored to conceal their guilt.[4] The examination was conducted without the presence of the advocate or procurator of the defendant lest he should be helped to conceal his crime;[5] socii or accessories were interrogated (and tortured) just as the principal.[6] Witnesses were confronted with the accused in faciem.[7]

The name and surname, country, age and occupation, or his station in life, having been noted, the

[1] Chartarius, Pract. Inter. Reor. b. 1, ch. 1. Interrogation was the strictly proper word. ibid, n. 12. [2] Or evocatus a tenebroso carcere. Chartarius, b. 1, ch. 3, n. 30. [3] Examen in acta per Notarium redditur. The proceeding was called constitutum from the first word of its record: Constitutus personaliter N., etc. [4] Chartarius, b. 1, ch. 2, n. 8. [5] Chartarius, b. 1, ch. 3, n. 2; b. 3, ch. 3, n. 2, 45. The Advocate and Procurator of the Fisc, but not those of the defendant were, however, present at torture. Chartarius, b. 4, ch. 3, n. 65. [6] Chartarius, b. 1, ch. 3, n. 11. [7] Chartarius, b. 3, ch. 3, n. 26, 28, etc. The defendant apparently did not have

defendant was sworn to tell the truth in every respect.[8] If the defendant proved obstinate and refused to answer, that is to answer yes or no to the questions put; or merely said, I don't know or I don't remember, the Judge might fine him or demand security for the fine, or put him to torture, but the former remedy seems to have been merely theoretical, for torture might be inflicted in any event, and furthermore a recusant defendant might be adjudged contumacious and the charge taken pro confesso.[9] Chartarius, whose handbook must have been a Godsend (if the term be admissible) to the profession, gives much assistance to the cross-examiner, who might be baffled by the shifty and crafty answers of the defendant.[10] The questions were dictated in Latin to the notary, and then propounded in the vernacular to the defendant if he was unlearned, and the Judge also repeated the answers to the notary, and the notary wrote the answers as they were made either in Latin or the vernacular.[11] Chartarius makes many suggestions as to the conduct of the Judge. He must invoke the aid of God, devote himself to his task, must not become enraged at those whom he thinks evil, nor moved to tears by the prayers of the unfortunate; he must not allow his countenance

the right to cross-examine. [8] Chartarius, b. 1, ch. 3, n. 12; b. 3, ch. 3, n. 12. Laymen were sworn on the Evangelists; the clergy by laying their hands on their breasts. Chartarius, b. 3, ch. 3, n. 18, 36. According to Clarus, b. 5, Sent. § fin. q. 45, n. 7, some authorities disapprove of the oath as it led to perjury. Daily experience, Bartolus says, shows that the defendant does not usually confess his crime. [9] Chartarius, b. 3, ch. 2, n. 1 to 8. [10] Chartarius, b. 3, ch. 2, n. 27. [11] Chartarius, b. 3, ch. 3, n. 22; b. 3, ch. 2, n. 90. It would appear that at this time the educated were able to use Latin colloquially. The method was obviously open to abuse by the Judge, and Chartarius cautions against any distortion of the testimony and likewise warns the

to divulge his purpose, but should exhibit sternness in order to extract the truth. It was a debated question whether the Judge should endeavor to trick the defendant with catch questions, but the better opinion seems to be that it was lawful, as intended for a good end, and a broken promise of immunity was by many Doctors also excused on the same ground that, the object being to ascertain the truth, it made no difference how it was attained.[12] Finè distinctions were made by some. The Judge might intimate that he knew all about the whole matter and the defendant's guilt and thus induce a full confession, but he must be careful not to say that he actually had this knowledge, for that would be a lie.[13] This ordinary and routine examination of a defendant was called de plano as distinguished from that under torture or what was synomymous, by the question,[14] and theoretically the latter was not to be employed, if the facts concerning the crime could be otherwise ascertained.[15] After the examination was concluded, and the accusation framed[16] the defendant was put ad largam, and given permission to consult with his advocate and procurator and others, in order to prepare his

notary. [12] Chartarius, b. 2, ch. 1, n. 17, etc. [13] Chartarius, b. 2, ch. 1, n. 77. A warning is given in this chapter, n. 16, against disputations with shrewd defendants accused of heresy lest the Judge should lose sight of the real matter for investigation. [14] Chartarius, b. 4, ch. 1, n. 1; b. 3, ch. 3, n. 36; b. 4, ch. 1, n. 1. De plano, on the level (ground), i.e., not on or from the Bench; sometimes, therefore, out of court or extrajudicially. See Dig. 48, 18, 18, 10, "Custodiae (i.e., custoditae personae) non solum pro tribunali, sed et de plano audiri possunt;" Gloss on pro tribunali in Dig. 37, 1, 3, 8, viz.: "judice sedente, non de plano," etc. The meaning here as applied to the examination apparently indicates its informality as compared with torture. Cf. Ital. *di piano*, without due form of law. DuCange, *de plano = moderate, sine vi.* [15] Chartarius, b. 4, ch. 1, n. 15. [16] completo processu.

defense though apparently this privilege was sometimes denied,[17] and for that purpose was given a copy of the proofs, at least if it was demanded.[18]

In the great majority of cases, however, it would appear that the examination de plano was not considered sufficient, and torture in some form was inflicted in order to obtain a fuller or more truthful confession from the accused.

The late Henry C. Lea, in his essay on Torture, included in his fascinating volume entitled Superstition and Force, has related the history of the subject with a masterly hand; and what follows must be read in connection with Dr. Lea's essay as supplementary to it. It must be borne in mind that torture was not regularly a form of punishment, but an incident of procedure, a means of eliciting the truth from the defendant or from the witnesses. Its basis in the Roman law is found in the 48th book of the Digest, title 18, de Quaestionibus; quaestio, meaning primarily a judicial investigation or inquiry, became a term equivalent to the method by which the facts were ascertained, that is, torture, and one who was subjected to it was said to be put to the "question." The word in this usage survived and Hippolytus de Marsiliis, for example, wrote his Tractatus de quaestionibus in the form of a commentary upon this title of the Digest.

In the early days of Rome freemen were not liable to torture, but only slaves whose testimony indeed was not considered valid without it. As

[17] Chartarius, b. 3, ch. 3, n. 47. I cannot ascertain the precise meaning of *ad largam*, presumably "at large," in comparison with the former solitary confinement. [18] The practice varied. Chartarius, b. 3, ch. 3, n. 52.

Dr. Lea remarks: "When we consider the position occupied by slavery in the Roman world, the immense proportion of bondmen who carried on all manner of mechanical and industrial occupations for the benefit of their owners, and who as scribes, teachers, stewards and in other confidential relations, were privy to almost every transaction of their masters, we can readily see that scarce any suit could be decided without involving the testimony of slaves, and thus requiring the application of torture. It was not even, as among most modern nations, restricted to criminal cases. Some doubt, indeed, seems at one time to have existed as to its propriety in civil actions, but Antoninus Pius decided the question authoritatively in the affirmative, and this became a settled principle of Roman jurisprudence, even when the slaves belonged to masters who were not party to the case at issue."

It is not here intended to trace the history of Torture and its gradual development. It is sufficient to say that even under the Roman law the exemption of freemen from torture was gradually impaired and abandoned, and by the time of the middle ages an exemption, more or less complete, was only granted in favor of the nobility and clergy. In the Old Yellow Book Guido's counsel claimed that he was privileged for this reason, but the plea was ineffectual. Practically speaking, all persons were liable to be tortured, but in special cases, such as have been mentioned, clearer proof or more urgent necessity was required.

The great influence of the Inquisition upon the development and permanency of torture must not be overlooked. The subject is too vast to be more than indicated here, but that influence was

immense. The Inquisition found the procedure ready to its hand. It studied and improved it, if such an expression be permissible, and the secular tribunals in turn were not slow to emulate the example of the Church. The inquisitorial process, including not only torture, but its secret administration that became so important, had a most vicious influence upon the secular law, and indeed it may be said that both the Civil and Canon laws eagerly copied each other's excesses. All Europe, or rather all continental Europe, was overshadowed by this terrible perversion of justice, and no part of the continent suffered more than did Italy, where naturally the influence both of the Ecclesiastical and of the Roman law was most powerful. Human imagination is baffled by an attempt to appreciate the extent of human suffering inflicted in the endeavor to administer justice by means of cruelty. The pages of Dr. Lea, and what is here added to them, will give only a faint idea of the low estimate put upon human sensibilities, and the great indifference to the most agonizing pains of the unfortunate victims.

We should not, however, rashly conclude that those who thus administered the law were bloodthirsty or cold-hearted men, or even that they approved without qualification the methods which they employed. Torture was part of a system that they found in universal practice and sanctioned by the approval of the wisest men for ages, with defects perhaps recognized by many, but not so defective as to justify its abolition in the absence of some other system that seemed clearly to be a better substitute. Everyone in this country now perceives the moral wrong of slavery, but in the middle of the last century some of our

best and most conscientious men were its warm defenders. The lawyers of these bygone ages are not hastily to be convicted of hypocrisy when they justified torture on the ground that the extraction of the truth concerned the salvation of the soul;[19] the upholders of slavery had very tender notions about the conversion of negroes. The brag of the common lawyers, such as Blackstone,[20] that torture was not allowable by the laws of England, is not without some justification, and yet as David Jardine has shown in his Reading on the Use of Torture, torture was, before the Commonwealth, always used as a matter of course in all grave accusations at the mere discretion of the King and Privy Council, though it was not a part of the regular judicial procedure and as such administered by the Courts. Indeed in this respect the use of torture in England was perhaps more reprehensible than in the civil law countries from which it was most probably borrowed. And moreover the administration of the criminal law in England at the very time when Blackstone wrote was not such as to justify any exuberant self-glorification, characterized as it was by a harsh severity or even brutality that seems now almost incredible. No nation has a monopoly of either virtue or vice. Our ancestors tolerated and approved the punishments of burning and of drawing and quartering; the sentence of peine forte et dure; and the horrible conditions of the public prisons as related in the Oeconomy of the Fleete;[21] and we should not assume a Pharasaical attitude of self-complacency. Mutato nomine de te fabula narratur, said the Latin moralist. A few

[19] Farinacius, qu. 37, n. 4. [20] Com. IV, # 326. [21] Edited by Augustus Jessopp. Camden Society. 1879. [22] Torture could not

years ago I saw the English convict ship Success, on its visit to Philadelphia, whose career as a transport began in 1802 and continued for half a century. I saw the cells, the heavy chains, the iron punishment balls, the straight-jackets, the wire flogging-whips, the gags, and all the other relics, and I thought that the medieval tortures which I am about to describe were not much worse.

These tortures were inflicted as part of a convict's punishment, but torture under the civil law was employed to extort a confession from the defendant or true testimony from a witness.[22] It is very natural to frame a theory that one who wishes to conceal the truth will change his mind under the compulsion of pain. As the Head Jailer and assistant Tormentor in the Yeoman of the Guard remarked, "In the nice regulation of a screw, in the hundredth part of a single revolution, lieth all the difference between stony reticence and a torrent of impulsive unbosoming that the pen can scarcely follow."[23]

Of course during all these centuries there were not wanting men who decried not merely the inhumanity but also the uselessness of torture. Blackstone[24] quotes a well-known passage from Cicero, and Ulpian[25] says that reliance is not always to be placed on torture; it was unsafe and

be inflicted on a convict, and the judge who should order it was held in syndicatu and punished. Farinac. qu. 40, n. 4. However, we find some instances where convicts were tortured in Scanarolus, De Visitatione Carceratorum. App. ch. 22. And of course a sentence to the galleys or the mines was in effect as bad as torture.

[23] It is pretty to observe, as Pepys would say, that the native officers in India found it pleasanter to extract a confession from a prisoner by rubbing red pepper in his eyes than to hunt up evidence in the hot sun. 1 Stephen, Hist. Crim. Law, 442.

[24] Com. IV, # 326. [25] Dig. 48, 18, 1, 23.

dangerous. Many men, he adds, through their fortitude, despise torture so that in no way can the truth be squeezed out of them; while others would lie and implicate others, rather than suffer. Hippolytus de Marsiliis in his commentary on this passage discusses the question at some length and also the presumed correction of this defect by the recognized rule of practice that a confession given under torture must be ratified afterwards without torture. All the great Italian criminalists seem to regret the necessity of torture and as time passed the feeling increased that it was a mistake. Scoppa in his notes on De Sarno's Praxis[26] concludes: "by Hercules! it is a trial of endurance rather than of truth." The expression was not original with Scoppa. Many others said the same thing,[27] and went much further in their denunciation of the practice; some indeed even regarded torture as heathen and un-Christian.[28] Numerous writers might be quoted on the subject, but perhaps the most comprehensive discussion is that of J. D. Raynaldus, whose *Observationes* were contemporary with the Old Yellow Book. Raynaldus found indeed no precedent for torture in the Bible; Moses, despite the fact that he was dealing with an obstinate and stiff-necked people, did not use it,[29] but he concluded that it is not repugnant to theology and that it is necessary to good government. Raynaldus admits, however, that torture is not always efficacious in extracting the truth and instances in particular a case heard by him as Judge where innocent men who had confessed under torture were exonerated by the timely

[26] Ed. of 1687, Part 1, ch. 41, note. [27] Raynaldus, Obser. 34, § 12, n. 21. [28] Especially in Scanarolus, De. Visit. Carcer, b. 2, § 6, ch. 2. [29] Yet the bitter water of jealousy in Numbers v, 18, was by

confession of the real criminal; which he says, Praised be God! snatched these poor fellows from the jaws of death — and saved Raynaldus himself from much embarrassment.[30]

In the time of Guido's trial, however, the system was in full force, and perhaps may be said to have reached its zenith. It survived long afterwards in Italy. Smollett, writing in 1764,[31] speaks of the strappado, or torture of the cord, as inflicted at Nice. "This last is performed by hoisting up the criminal by his hands tied behind his back, on a pulley about two stories high; from whence the rope being suddenly slackened, he falls to within a yard or two of the ground, where he is stopped with a violent shock, arising from the weight of his body, and the velocity of his descent, which generally dislocates his shoulders with incredible pain."

In this same year the Marquis Beccaria in his treatise on Crimes and Punishments called attention to the illogical theory of torture,[32] and the Grand Duke Leopold of Tuscany, by a decree promulgated November 30, 1786, abolished torture in his dominion.[33] The reform, which apparently was thus inaugurated, spread over the rest of the continent, as well as Italy. In France the abolition of torture seems to have become effective by the law of October 9, 1789, but it is a melancholy reflection that torture has, generally speaking, been

some quoted as a precedent. [30] Raynaldus, Observ. 34, § 12, n. 9. [31] Travels through France and Italy, p. 200. [32] Quoted by Dr. Lea, Supersition and Force, 586, and by Blackstone, b. IV, # 326: "the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime." [33] Pamphlet. Edict of the Grand Duke of Tuscany for the reform of criminal law in his dominions, translated from the Italian together with the original. Warrington, 1789 ["This pamphlet not

abolished in Christendom for only about a century.[34]

All the works on criminal law contain discussions and descriptions, more or less comprehensive, of Torture, which formed such an important part of legal procedure. The principal older authorities are Angelus de Gambilionibus and Hippolytus de Marsiliis, in the fifteenth century; Damhouderius and Zangerus, in the sixteenth, followed by Farinacius and by Paulus Zacchias and Scanarolus in the seventeenth century. The later authorities are of special interest to us, as they show the methods of torture in use in Italy at the time of the Old Yellow Book and consequently those under which the torture of Guido and his associates was probably directed.[35]

Upon the whole the fullest statement of the different kinds of torture then in use and the clearest account of its administration appear to be contained in the Quaestiones Medico-Legales of Paulus Zacchias, from whom it is worth while to quote somewhat at large. According to Zacchias there were four kinds of torture then in use, viz.: that of the rope or Cord (funis vel chorda); the Vigil; the taxilli; and the sibilli; the torture of fire and others mentioned by earlier writers having apparently lapsed into disuse; and Zacchias says that the Judges had forbidden the use of new methods.[36] The usual torture of the Cord is thus

to be sold"] §§ 33, 54, relate to this subject. [34] A. K. Cook in his excellent Commentary on The Ring and the Book reviews the history of torture in Appendix VI. [35] To these authors may be added: Flaminius Chartarius; Bassanus; Scanarolus; Sarno's Praxis, including Il Medico Fiscale by Horatio Greco; Christophorus Crusius; Nicolinus, Praxis Judiciaria; Brunus, Blanchus and Ghirlandus in Zilettus, Tractatus Criminales. [36] So Scanarolus, b. 2, § 4, ch. 4, n. 8, and authorities cited by him. Cf. Chartarius Inter. Reor., b. 4, ch. 1, n. 12. Chartarius Pract.

described by Zacchias.[37] "The defendant is stripped[38] and his arms are twisted behind on his back, placed one upon the other, and bound very tightly above the wrist or forearm with a narrow cord of leather, not as wide as a finger, which they call la stringa. Next they are fastened again over the first cord with a thicker one, also of leather, but long and smooth, and by this the defendant is attached to a rope hanging from a high pulley; then he is pulled aloft by the wheel of the pulley and is left hanging in this manner at the pleasure of the Judge. Sometimes the defendant is raised up as high as the pulley, the rope is slackened, and the defendant is allowed to fall down by his own weight, in such a way that he remains suspended from the ground; and this is sometimes repeated two or three times. But because the simple suspension is sometimes not enough, nor the repeated jerks,[39] the Judges invent many ways to inflict greater anguish upon the defendants, such as shaking the rope, hanging weights upon the defendant's feet, basins filled with water fastened to the feet, a rod inserted between the feet to spread and stretch them apart, and other things of the sort, but above all in former times there was used cold water

Inter. Reor., b. 4, ch. 2, n. 6, gives the formula for the torture of Fire. [37] Quaestiones, b. 6, tit. 2, qu. 1, n. 15. [38] This was in order that no charms might be concealed about the person. Chartarius, Inter. Reor., b. 4, ch. 1, n. 222. [39] ictus. Sometimes tractus is the word used. Raynaldus, Vot. 58, n. 6; Nicolinus, Praxis, 272. "Faciunt squassari reos vel funem percuti." Guazzin, def. 30, n. 10. Ictus, tractus, and squassus seem to have the same meaning. Chartarius Inter. Reor., b. 4, ch. 1, n. 99, 100. In n. 131 the word "saccatas" is used. Novellus, Trac. Crim. 99, says, "tres saccatas videlicet unam cabaletam, et duos squassos." Zacchias, b. 6, tit. 2, qu. 3, n. 4, calls particular attention to the difference between mere suspension and jerking, which he says Farinacius does not sufficiently distinguish. Suspension, Zacchias says, causes molestia or discomfort (it must have been, however, very

thrown on the back, of all which we shall fully treat in their appropriate place."[40]

After some discussion as to the antiquity of this form of torture, Zacchias passes to that of the Vigil and says:[41] "The second mode of torture, which they use at present, is that called the torture of the Vigil; which indeed seems much more severe in some respects than the torture of the Cord. This torture is of the following nature; the defendant is stripped entirely naked, and all his hair, even of his secret parts, is shaved off; his arms are twisted backward to his spine, as in the torture of the Cord, and he is bound as though he were to be tortured in that way. A three-legged bench is ready which they call the 'she goat' or 'horse,' in the vernacular 'il cavaletto,' six feet high, the top of which is made of a quadrangular wooden board as thick as a thumb, and two hand breadths wide; the surface of the board is not altogether level, but is raised slightly and gradually towards the middle, where it ends in an obtuse angle, or rather it forms a blunt level. The defendant, being fastened in this way to a cord hanging from a pulley is placed there in a sitting posture. A broad girdle is moreover placed upon his breast and fastened back to the nearest wall, and on either side each shoulder is tied in the middle to the walls; then a long rod is placed upon the feet, spreading them apart, so that the defendant cannot join them together. This rod, when elevated by another rope, by which it is held in the middle, raises up the feet and even the legs of the defendant, and is fastened to the opposite wall. In this situation the wretched fellow is left for ten, twelve, fifteen or twenty and

severe), whereas ictus causes dolor. [40] C. Chartarius, Inter. Reor., b. 4, ch. 1, n. 107, etc. [41] b. 6, tit. 2, qu. 1, n. 19.

more hours at the pleasure of the Judge, unless he confesses his crimes; this precaution, however, being observed, that his arms, being twisted back should not be too greatly stretched by too thick a rope being suspended from the pulley, for it happens that these miserable defendants are in danger of their lives by their arms being greatly stretched.[42] As Farinacius notes,[43] many perish in the very torture by too much stretching of their arms. But in other respects, although the defendants experience great pain and agony and much distress and hardship from this torture, yet they incur no danger of life unless there is some trouble, as a weakness of their chief organs, some special disease, habit of body or temperament, age or the like as we shall see in the proper place." Zacchias follows this description of the more usual tortures of the Cord and the Vigil with that of two others; first la Stanghetta or the Taxilli, employed when the health or strength of the defendant was insufficient to enable him to endure the Cord and the Vigil; la Stanghetta was a cruel and ingenious method of compressing the feet of the defendant by means of wedges;[44] the second, used for those still weaker and for boys and women, was called the Sibilli, which squeezed the fingers.[45] Zacchias also mentions some other forms of torture that were anciently practiced in order to show the comparative lenity of those in current use. He speaks of the torture by starvation, by thirst aggravated by the administration of salty food; the old form of the vigil by deprivation of sleep for

[42] A thick rope would not give as much as a thin one, hence the arms would be more stretched. [43] qu. 38, n. 61. [44] Chartarius Prac. Inter. Reor., b. 4, ch. 1, n. 9. [45] But women were often subjected to the more extreme forms under certain conditions.

forty hours; torture by the application of fire to the bare feet greased with lard, and by the method known in modern times as the "water cure," filling the defendant with water which sometimes contained lime or vinegar.[46] "By my faith!" he adds, "that was a funny thing, but I think it was extremely annoying, that they used to do with a beetle, of which torture Brun. de Indiciis et Tortura and Bellovis. in Pract. Judic. speak. The defendant was stripped and bound, and a live beetle was placed on his belly or in the navel, then it was enclosed in a platter or cup, so that it could not crawl out; for it is wonderful how much annoyance the little creature can cause in this way; but why should I say it is wonderful in a beetle? he who does not believe it may reflect how annoying a flea may become when it is confined in one's ear.[47] I think the following torture was much more annoying, but it was not attended with much danger if it were employed with moderation. After the shoes of the defendant were removed and he was bound, his feet were wet with salt water; perhaps salt was rubbed on the soles, and he himself tightly fastened on a bench, so that he could not move from his position; and then they brought a goat to lick his feet, for it would happen that the goat attracted by its fondness for salt would in licking him cause great discomfort by the roughness of its tongue, nor could it be easily endured, for it is evident that it caused not merely annoyance but pain, since sometimes the goat would gnaw the flesh away even to the bone."[48]

[46] Chartarius gives the Formula or directions. Inter. Reor. b. 4, ch. 1, n. 3. [47] A French writer says that sometimes hornets were substituted, but I can find no authority for this. Tortures et Supplices, Fernand Mitton [F. de Valmondois]. However, the improvement was obvious enough. [48] Zacchias, b. 6, tit. 2, qu. 1,

As Hippolytus de Marsiliis invented the original torture of the Vigil, it may be interesting to quote his description of it.[49] "There is another kind of torture that I have often used for the obstinate and those who do not fear torture, and no one is found so hardy as to resist it; and it is a torture that does not injure the body, yet it is extremely efficacious, and if I had not made trial thereof, it would seem rather a joke than a torture; which is as follows: The defendant is placed on a bench in a sitting posture, and there sit beside him two men to watch him so that he does not sleep either by day or night. And when the defendant leans his head to one side on account of sleepiness, the attendant on that side strikes him with the hand and wakes him and raises his head, likewise the other attendant does the same when the defendant leans his head over on the other side. When these two are tired and want to sleep, two other attendants are substituted in their stead, and these do not permit the defendant to sleep or rest; so that at the latest in two nights and one day the defendant will confess everything for the promise of sleep. And I likewise tried this in the case of two women criminals, when I was Capitaneus Vallis Lugani,[50] who did not fear any of the other tortures above mentioned, but under this, in the space of forty

n. 28. Hippolytus de Marsiliis mentions both these forms of torture as in use when he wrote, with some others that I will not repeat here; he says the goat-licking was without danger, but obviously that would depend upon the method of administration. De Quaestionibus, fo. vi of the edition of 1542, n. 55. Zacchias, b. 6, tit. 2, qu. 3, n. 20, notes the annoyance caused in torture by the sweat running from the head and trickling down to the top of the nose; he says that some of the wretched defendants have taken their solemn oath to him that they found this more distressing than the torture itself. [49] De Quaestionibus, fo. vi of the edition of 1542, n. 55.

[50] Capitaneus, in feudal law, meant one who held the feud directly

hours they fully confessed all their crimes, therefore you may rest assured that this kind of torture is of the greatest power, and it does not weaken the body, so that by its use the Judge can never be held in syndicatu." Hippolytus de Marsiliis evidently considered this invention a humane substitute for the other forms of torture and so it would appear to be in its original form; but as it was later developed it was certainly extremely severe and dangerous as appears from the above description of Zacchias and from that given by Farinacius which it seems worth while to add here in full as only a partial translation is given by Mr. Hodell.[51] "The fifth and last torture," says Farinacius,[52] "in use with us is the torture of the Vigil of which Marsilius makes mention in dict. l, 1 in princ. ff. de quaest. n. 76, vers. 'nam ponitur reus.' In the time of Marsilius, who as he himself asserts, seems to have been the inventor of this torture, the defendant was placed upon a bench in a sitting posture, and two men were present to watch him lest he should sleep, and if he wanted sleep they aroused him, and did not permit him to sleep or be quiet for forty hours, insomuch that when rest was promised him he was forced to confess within that time. And as to this form of torture, Marsilius says that although the thing seems ridiculous, yet no one is found so hardy as to be able to resist it, and so in another place he asserts that he himself made trial of it. But today, by the fate of our evil times, I do not know whether it be on account of the severity of the Judges, or in truth the obstinacy of our abandoned criminals, this kind of torture is administered in a manner that is more cruel and severe. For a bench of the

from the Crown or Duke. [51] Topical note 526. [52] qu. 38, n. 70.

kind that some call the 'she goat' is raised above the ground as much as a man's height, its top is not level but a little higher in the middle, and from its highest point its four sides slope away about a hand breadth and a half on each side.[53] The defendant is placed upon the top of this bench, stripped naked and tied on every side so that he should not by chance fall off, with his hands bound behind him and fastened to a rope that is placed above the bench, just as if he was to be tortured (with the Cord), and what is worse, with his arms stretched by the said rope either to their full length or partially as it pleases the Judge. And there the unlucky defendant, thus naked and with his hands bound behind him and fastened to the rope, and with his arms stretched out, is kept for five or ten hours and sometimes even a little longer at the discretion of the Judge, so that he suffers at the same time the torture of both the Cord and the Vigil which is a pitiable thing.[54] And out of a hundred men who have suffered this torture, I do not believe four or five have been martyrs, the rest indeed were confessors. The torture is indeed insupportable by reason not only of the time but also of the terrible pain and anguish. It is very true that I have observed this as customary only in the cases of 'most atrocious' crimes, as laesa majestas, assassination on the streets, highway robbery, notorious robbers, persons under ban and the like;[55] therefore in inflicting such

[53] ex altitudine quatuor pendent latera unius palmi cum dimidio in circa pro quolibet latere. I am indebted to Professor Herbert H. Vaughan of the University of Pennsylvania for his suggestions as to the translation of this passage. It is omitted by Professor Hodell. [54] Dr. Lea in his mention of the Vigil apparently does not note the difference between the original and the developed form of the Vigil. [55] Mr. Hodell translates: "infamous nudity and such

torment the Judges proceed with great restraint, and above all things take care not to stretch the arms of the defendant very much, because such stretching for a long time is dangerous of itself, and many have died because of it during the torture itself, and very many have fainted.[56] And as I have said they do not use this torture except in the 'most atrocious' crimes, and in a case where the indicia are not only urgent, but most urgent against the defendant, and so it is practised with us. And just as I am writing this there has come to hand the Practice of Interrogation of Defendants by Flaminius Chartarius who in book 4, ch. 2, n. 7 and 8, well lays down the formula for the examination of defendants in the torment of the Vigil."[57]

Nicolinus in his Praxis[58] describes the rules for the duration of the torture of the Cord very much as does Grillandus as quoted by Dr. Lea. According to his account, which is not devoid of grim humor, the first grade was merely the active preparation, which was sufficient for the weak or faint-hearted; the second consisted in actual suspension during a time long enough for the recitation of a Pater Noster or a Miserere; the third, for a longer time sufficient for two Misereres or more, but

crimes under the ban," the text being "disrobatoribus famosis." A disrobator or derobator, however, did not take off his own clothes, but stripped his unfortunate victims. See DuCange, Derobare, robare; and Spelman, Gloss, Derobare, robaria, robatores. [56] As did Alexander Baldeschi in O. Y. B. CXXV, 133, § Neque vero, Ch. V, sec. 13. [57] Chartarius goes into great detail in his practical instructions for the examination of defendants under torture, reproducing the cries of agony which were undoubtedly its invariable accompaniment. See passim, b. 4, ch. 2. He wrote in the latter part of the 16th century and refers to the developed form of the torture of the Vigil as having recently come into use and sparingly inflicted. [58] n. 268, p. 111 of the ed. of 1701.

without any jerking of the rope; in the fourth grade, the defendant was suspended for fifteen, twenty, thirty or forty minutes or even a full hour, during which the rope is jerked once or twice or oftener according to the nature of the crime, etc.; in the fifth grade, weights are in addition fastened to the feet of the defendant, but this was only done in case of the "most atrocious" crimes such as heresy, laesa majestas or treason, etc. The author criticizes severely those blood-thirsty judges who use this form of torture indiscriminately, whose souls, he says, should be buried in hell.[59] The theoretical safeguards against the abuse of torture were numerous and solemnly reiterated by all the authorities; in practice, however, the accused had little protection, as the administration of torture was in effect entirely subject to the discretion of the Judge, and it must indeed have been only the most flagrant abuse of such discretion that would have been considered a violation of the defendant's rights. Even then the mischief would be done, and in such a way that reparation would be impossible. It is, however, worth while, in order that the arguments in the Old Yellow Book may be appreciated, to mention two general rules upon the subject of the infliction of torture, especially the torture of the Vigil; the first related to the grade of the crime; the second to the quantum of presumptive proof; but the authorities drew so many

[59] Chartarius gives minute directions. See passim, Inter. Reor. b. 4, ch. 1, n. 113, etc. Sometimes the duration of torture was measured by an Ave Maria or other prayers. Guazzinus, def. 30, ch. 22, n. 5; def. 30, ch. 21, n. 13. Scoppa in his note to De Sarno's Praxis, ch. 41, draws a vivid picture of the mental agony of a defendant conducted to torture as he looks upon the apparatus prepared for his reception. Alexius in his notes on Nicolinus, p. 34, says that the defendant, having been completely shaved, is given a mirror so that he may be frightened by his own appearance.

complicated distinctions that the rules amounted to little or nothing. By the time of the trial of Guido at the end of the seventeenth century, the legal literature had increased to such an enormous bulk that a precedent could be found for almost anything; and the rules which the bewildered jurists attempted to lay down became little else than verbose statements of inconsistent opinions. What follows, therefore, can have no pretense to strict accuracy.

The torture of the Vigil had so developed from its early invention by Marsilius that it became easily, as shown above, the most dreadful ordeal to which a defendant could be subjected, and the temptation to apply it as the most efficacious method to extort a confession led the Judges to resort to it so frequently that it was found necessary to restrict its use. Accordingly Pope Paul V[60] decreed: "The judges shall not employ the torment of the Vigil except in the 'most atrocious' crimes, in which there shall also appear beforehand the most urgent indications [indicia] of guilt, and not then unless by vote of the Congregation of that tribunal in which the defendant is accused,[61] and the defendant shall never be subjected to the torment of the Vigil on the same day in which he has been tortured by another kind of torture."

The first condition therefore was that the crime be of the class denominated "most atrocious," of which some description should be given.

The writers of the period in question were not distinguished for accuracy and clearness of definition,

[60] Constitution 71, § 10, n. 30, promulgated in 1611. 3 Magnum Bullar. 261; Bassanus 279, 285. But the same requirements are laid down by Chartarius in his formula dated 1587, so that the Bull merely declared the correct rule. [61] i.e., by the court "in banc." See Ch. V, post. sec. 31.

and this defect was due to a large extent to the liberality accorded to judicial discretion, and also to the absence of the jury from their legal procedure. Where questions of fact are decided by one division of the Court, and questions of law by another, exact definition is imperative; where, however, the Judge exercises both functions such definition becomes, if not merely unnecessary, an actual impediment to speedy decision. It is not therefore surprising to find it extremely difficult to extract from the authorities accurate statements of legal distinctions.

Delict, according to Farinacius,[62] is a general term including crimen and maleficium, and signifies any wrongdoing, whether by evil intention or through ignorance or with an intention that is not evil. Delicts were of four classes: levia or trivial; gravia, enormia or atrocia, that is, serious; graviora, atrociora or magis enormia, more serious; and gravissima, enormissima or atrocissima, most serious, or as we may anglicize these words merely as technical terms, atrocious, more atrocious, and most atrocious. Illustrating, rather than defining the difference, Farinacius says that what delicts are levia and what are atrocia is determined by the sound discretion of the Judge from a consideration of their characteristics or qualities [qualitates] according to the nature of the deed, and the status of the criminal or of the injured person, considering also the kind of weapons used, the part of the body injured, the cause, time, place, and result of the injury. So too, a crime which affords an evil example is considered much more serious than others; one committed at night or secretly is much more serious than one committed by day or

[62] qu. 18.

openly; and more serious if done by poison than by the sword; homicide effected by means of treachery approximates laesa majestas or treason according to the status of the parties, and the manner or method of the treachery, as where a man kills one who is not an open enemy and hence not on his guard, or under pretense of friendship. An offense committed on the person of a cleric or official is greater than the same offense against a private individual, and the same rule applies where the offender is a cleric or other persona sapiens.

The classification of delicts is also affected by the corresponding nature of the punishments prescribed for them according as these are levia or gravia; but this raises an interesting and rather obscure question. Farinacius[63] gives it as his opinion that in doubtful cases where neither the law nor reason [natura] makes it clear, the grade of the delict is determined by reference to the punishment. He cites authorities which hold that in cases of pecuniary fines of more than a third part of the offender's goods the delict is grave; if the punishment is civil death the delict becomes gravius, or "more atrocious;" but if the punishment is natural death it is "most atrocious." Clarus, however,[64] was of a different opinion, holding that when the punishment is either civil or natural death or life sentence to the galleys, the offense is "atrocious," but when the punishment of death is aggravated and the criminal is mutilated, broken on the wheel, or drawn at a horse's tail, the offense becomes "more atrocious" or "most atrocious." Such, e.g., are the crimes of rebellion, laesa majestas, deliberate homicide, counterfeiting,

[63] qu. 18, n. 87. [64] Pract. Crim. § 1, versic. **Ego autem dico.**

wounding committed treacherously with a sclopus rotatus,[65] etc.

Farinacius after his review can only revert to his previous opinion that the whole matter rests in the sound discretion of a prudent judge who renders his judgment as best he can according to the custom of his own country.[66]

It is probable that this unsatisfactory attempt at the gradation of crime originated from an early classification according to the degree of moral guilt exhibited by the criminal, in which the punishment would naturally be made suitable. In course of time as punishments were devised to meet new offenses, or public opinion changed with reference to old ones, these offenses were defined by reference to the punishments prescribed for them. Thus Carpzovius, the great German criminalist, expresses his opinion as to the classification:[67] "And so this distinction is concerned chiefly with 'atrocious' or 'more atrocious' [which Carpzovius says are the same] and 'most atrocious,' just as also criminal punishments are either 'atrocious' or 'most atrocious,' from which also the judicial distinction is drawn concerning the crimes themselves; for from the nature of the punishment which is imposed for a crime, the nature and magnitude of the crime is determined, and therefore a crime should be adjudged by so much more serious, as a more serious punishment is found to be imposed for it."[68]

[65] A pistol provided with a wheel, one of the earliest forms in the evolution of the modern weapon. [66] Spreti, § Delictum autem, XXXVI, 34, Ch. V, sec. 4, cites many authorities to show that Guido's crime could only be "most atrocious" if it were one for which a penalty more severe than mere death could be inflicted, such as cutting into pieces, burning, or the like. [67] Practica, Pait 3, qu. 102, n. 61. [68] Scanarolus, Book 2, § 6, ch. 4, n. 14, expressly says that the gravity of a crime is best distinguished by the gravity

The designation of crimes as atrocious, more atrocious, and most atrocious became in time little more than a label, the connection with the moral characteristics of the particular crime becoming theoretical or inferential. We would hardly imagine, for example, that to kiss a girl in the street against her will would be considered a "most atrocious" crime, yet it was included in the catalogue, and the gallant who lost his head in such an exploit stood an excellent chance of losing it in a more serious manner, or of going to the galleys as it happened in some reported cases.[69]

There may be here a parallel with the history of the "felony" of English law, a word that appears originally to have connoted the moral obliquity of the offense, which naturally merited a severe penalty as forfeiture of goods with or without capital punishment. In later times the term simply indicated the degree of the crime and the distinctions that grew up have been obliterated.[70]

We pass now to the quantum of proof required. Proof or probatio was either plena, that is, full, producing sufficient belief to make an end of testimony; or semi plena, which produced belief but not sufficient to enable the Judge to give judgment, as e.g., one sight witness; comparison of letters, a private writing, or a presumption not urgent in its nature.[71] Various terms were used as substantially equivalent to presumption, such as indicium, argumentum, suspicio, adminiculum, circumstantia.[72] The term most frequently employed

of the punishment. [69] Muta Decisiones Siciliae dec. 62. Raynaldus, Observ., ch. 11, § 6. See § In progressu, Ch. VI, sec. 20. [70] Stephen's remarks on the subject of felony are interesting. 2 Hist. Crim. Law 192. See 2 Holdsworth, History 302; 2 Pollock and Maitland, 463. [71] Farinacius, qu. 36, n. 22. [72] Farinacius, qu. 36, n. 263, 267, 268, says these words strictly

in reference to torture is indicium, a sign or indication of the commission of a crime or other thing, or a conjecture arising from probability but not from necessity, or a probable suspicion arising from the probability of conjecture, or a probable presumption strongly moving the mind of a Judge to believe or disbelieve a certain thing.[73] Perhaps in the O.Y.B. it is used most frequently to indicate, as we would say, a suspicious circumstance.

It was a general rule that no one could be subjected to torture without precedent lawful indicia, which, says Farinacius, should be likely and probable; not light or perfunctory, but weighty and urgent.[74] This presumption of guilt was held to deprive the defendant's statements of credibility, but by being tortured, he "purged the presumption," and he is then presumed to have spoken the pure truth.[75] Of course, as will easily be seen, the whole matter rested in the decision of the Judge or tribunal. If the circumstances appeared to point to the prisoner's guilt, torture was inflicted. All the books repeat that this is a judicial discretion bound by law and equity, and not full and absolute; and it is often said that a Judge must not suppose the bodies of the defendants to have been created by nature for him to mangle.[76] These instructions and warnings, however, were, as has been said above, merely theoretical.

According to the regular procedure as thus stated, Guido and his accomplices were examined de plano, that is, without torture.[77] The narrative

differ but are used promiscuously. In n. 67, he gives a dozen definitions of presumptio, and adds, "You may take which you please for they all tend to the same thing although by different words." [73] Farinacius, qu. 36, n. 27 to 33. [74] Farinacius, qu. 21, n. 147; qu. 37, n. 1. [75] Farinacius, qu. 4, n. 26; qu. 40, n. 1. [76] Farinacius, qu. 37, n. 192, 200. [77] Mr. Hodell says in his note 526,

in the Secondary Source[78] states that the examination was held in the Inn at Ponte Milvio, where the criminals were apprehended, but the "Trial and Death"[79] says that they were taken at once to the New Prisons. Archangeli, who is more probably correct, says that upon their discovery at the Inn of Merluccia [Merluzza] they were taken (not taken back, as Mr. Hodell translates) to prison and examined as to the crime.[80] Merluccia, as Sir Frederick Treves shows,[81] is not a village but the name of a district of the Campagna. Ponte Milvio, mentioned above in the Secondary Source, was the residence of the Abate Paolo; the fugitives passed through it but did not stop.[82]

According to the Secondary Source, a satisfactory confession was obtained from the defendants, but the confessions of the Socii evidently differed from that of Guido, and were not uniform. Gambi says that some of them confessed, but although the others denied the conspiracy to commit the homicides, yet the most urgent presumptions appeared from the proceedings. Guido, on the other hand, confessed in his examination only that he had given orders to cut and disfigure his wife's face.[83] This qualified confession was made the basis of his counsel's learned arguments that if his companions had exceeded his orders, he was not responsible for their excess. And although

that Guido's first confession was made under torture. Spreti in that event could hardly have argued in § Quatenus vero, XXXV, 34, Ch. V, sec. 2, "in tali casu tortura erit simplex." [78] Hodell, 212; Everyman, 264. [79] Hodell, 217; Everyman, 278. [80] § Quibus controversiis, LXII, 66, Ch. VI, sec. 60. [81] Country of The Ring and the Book, p. 159. [82] Treves, p. 150. [83] Archangeli in § Haec sane, XXII, 22, Ch. VII, sec. 66, "ad incidendam faciem uxoris vel ad sfrisiandum;" Spreti in § Si igitur, XXXV, 34, Ch. V, sec. 1. In the pamphlet "Trial and Death," Hodell, 223, Everyman, 278, it is intimated that in his first examination Guido endeavored to

in their confessions the accomplices "named" him and claimed that he took part in the homicides, a sufficient though technical objection to the reception of their confessions against Guido was that the accusation was not repeated under torture in his presence.[84] The Fisc consequently was not satisfied to continue the argument upon this state of the record, and demanded that the defendants be subjected to torture in its severest form, that is, the Vigil,[85] while counsel for the defendants insisted that if torture was to be inflicted, the ordinary torture of the Cord was sufficient, inasmuch as the requirements of the Bull of Pius V were not fulfilled, and moreover in Guido's case he was exempt as a nobleman.[86] The Court decreed the infliction of the Vigil, and after this begins the secondary stage of the trial. According to the Secondary Source[87] Baldeschi was tortured only with the Cord, which was twice applied, but this seems inconsistent with Spreti's statements in the beginning of Pamphlet 9.[88] The pamphlet "Trial and Death"[89] apparently states that Guido confessed at the sight of torture, so that it was not actually inflicted. This seems to be correct. There does not appear in the arguments

shield his companions. I doubt that very much. [84] Archangeli, § Socii et comites, XXII, 22, Ch. VII, sec. 68. Chartarius, b. 4, ch. 2, n. 14. [85] Spreti, § Quatenus vero, XXV, 34, Ch. V, sec. 2. Gambi, § Hinc cum haec, LXIII, 67, Ch. VIII, sec. 72. Bottini, § Deducta, CXCV, 199, Ch. V, sec. 25. [86] Spreti, § Delictum, XXXVI, 34, Ch. V, sec. 4. Bottini, § Qualitas, CCIV, 207, Ch. V, sec. 28. [87] Hodell, 213; Everyman, 265. [88] CXXV, 133, especially in § Neque vero, Ch. V, sec. 13, where he says that Alexander [Baldeschi] fainted dead away under two applications "in eodem tormento," which clearly refers to the Vigil. Mr. Hodell seems to have been misled by the Secondary Source into the belief that the defendants were originally tortured with the Cord. In his introduction to the Everyman edition, p. xiii, Mr. Hodell says that Alexander fainted twice. [89] Hodell, 223; Everyman 278.

any explicit statement that the Vigil was actually inflicted upon Guido or indeed on any of the defendants except Alexander. The confessions of Guido and his accomplices are said to have been given under fear of this torture, but this might mean either fear of torture actually inflicted or merely apprehended.[90] The probability would appear to be that after the decree for the infliction of the torture of the Vigil, Guido at sight of the torture confessed, but some others underwent it. Guido's confession brought out in greater detail and rendered more emphatic his defense of causa honoris of which his counsel took full advantage.[91]

The arguments on the subject of torture and confessions with which the following chapter is concerned are therefore divided into two heads. First, those that were made upon the Fisc's demand that the torture of the Vigil should be inflicted, and second, the arguments after the decree for torture had been granted, upon the effect to be given to the confessions extorted by it; Guido's counsel claiming that either the confessions were null, because illegally obtained; or that if they should be received at all, they should be received as a whole, and given credence in all their details.

With this preliminary explanation we will now examine the arguments in the case.

[90] Bottini, § Redarguit, CLXIII, 171, Ch. V, sec. 29, note. And in Bottini, § Cum ergo, CXCII, 196, Ch. V, sec. 35, "accedente confessione" relates to the decree for torture, and not to the torture itself. [91] Archangeli, § Confessio, CI, 109, Ch. V, sec. 17.

CHAPTER V

THE ARGUMENTS AS TO THE TORTURE OF THE VIGIL

PREFATORY NOTE. The author has considered it better in translating the Old Yellow Book to follow the logical rather than the chronological order of the arguments. The same questions of law are discussed in numerous sections of the various pamphlets, so that a consecutive reading of them is very confusing. They have consequently been rearranged in the following chapters, with cross references and notes, so that the reader may more readily perceive the logical connection of the arguments upon both sides, and sometimes sections which relate to more than one subject have been repeated under different heads. This has frequently the effect of rendering the translation abrupt, but this disadvantage would appear to be more than counterbalanced by the preservation of the logical connection.

Argument in behalf of Guido and his associates upon the question whether they should be subjected to the torture of the Vigil; and the subsequent question as to the effect to be given to their confessions made during the infliction of that torture, or in fear of it.[1]

I

THE ARGUMENT AS TO THE DECREE FOR THE INFLICTION OF THE TORTURE

A. The torture administered to obtain a fuller confession should be simple, and not the torture of the Vigil, because under the Constitution of Paul V the

[1] A. K. Cook in his Appendix VI gives a good non-technical account of torture in connection with the arguments on the subject in the O. Y. B.

Vigil cannot be inflicted unless, first, the crime be "most atrocious," and secondly, there be the strongest suspicions or indicia of the defendant's guilt. Section 1

1. A crime is "most atrocious" only if a penalty more severe than death should be inflicted, such as cutting to pieces, burning, etc. This ignominious death cannot be inflicted on a nobleman; and we have shown that not even the death penalty is due here. 4

2. And although in the discretion of this Tribunal, one of these requisites might be dispensed with, yet the Vigil is never inflicted unless there is no doubt that the penalty of death should be incurred. 5

B. The alleged conventicle does not affect the question, because: —

1. As to the associates; those who are assembled are not liable but only he who makes the assembly. 6

2. As to Guido; he is not liable as he had a right to assemble his companions to restore his reputation. 7

C. The alleged carrying of prohibited arms does not affect the question, because, although by the Constitution and Banns the penalty for this has been greatly increased, yet this does not change the nature of the crime, which at common law is so insignificant that those indicted for it cannot be tortured. 8

II

THE ARGUMENT AS TO THE SUBSEQUENT CONFESSIONS

A. The confessions of Guido and his associates are null, because given under fear of the torment of the Vigil, unlawfully decreed against them inasmuch as the two requisites therefor did not exist. Section 11

And the discretion of the Tribunal extends only to crimes punishable with death, for the torture itself might cause death. 13

B. But the confessions and the evidence produced show clearly the adultery of the wife, and that Guido committed the crime ex causa honoris. 14

1. This appears from the confession of Guido in detail. 16

2. The confession should be accepted with all its qualifications in full, and the Fisc cannot divide and separate it. 17

a. This is so in criminal cases, however it may be in civil cases. 18

b. And where the question concerns the infliction of the death penalty. 19

c. And especially when the qualification of the confessions is conclusively justified as this is by Blasio and Alessandro. 20

d. Nor does it matter that Guido in his confession also mentions the plots against his life, because the causa honoris was the stronger in his mind; and besides, this other cause is equally sufficient to avoid the ordinary penalty. 21

Section 1.

[Spreti, Pam. 2, xxxv, 34, § Si igitur D. Guido.[1]]

If therefore Count Guido (even assuming that he had confessed that he, with the complicity and aid of the aforesaid, had killed his own wife, his father-in-law, and his mother-in-law) should not in accordance with what has been said, be punished with the ordinary penalty; much more readily should we arrive at this conclusion by observing that he merely confessed that, to use the words of the authorities, he had given a mandate only for disfiguring his said wife, for in this case he is not himself responsible for the resulting death of his said wife and of the others, Dec. cons. 622, n. 4, where it is said that he who gives the mandate in such a case can only be punished according to the degree of negligence, for which [negligence] not even corporal punishment can be inflicted. Grammatic. cons. 20, n. 1 and 2; Vermigl. cons. 16 throughout, especially n. 20; Petr. a Plaz. Epitom. delictor, lib. 1, cap. 15, n. 1., vers. "The same thing should also be said if the mandate had been given for disfiguring;" Menoch. de Arbitr. cas. 352, n. 3 and 4; Farinac. quaest. 135, n. 156.

[1] This section is repeated in the main argument, post Ch. VIII, sec. 67, where the notes will be found as to disfiguring, ad sfrisiandum. See Ch. VIII, sec. 66. It is inserted here in connection with the argument upon torture, in order to show the qualified nature of Guido's confession. In Spreti's argument this section beginning "If therefore" follows his discussion on the merits. As this was necessarily involved in the argument on the question of torture, the translation is complicated, and several sections are repeated under different heads.

Section 2.

[Spreti, Pam. 2, xxxv, 34, § Quatenus vero.]

So far indeed the Fisc has been unwilling to acquiesce in this kind of a qualified confession;[1]

but since he alleges the right to torture the defendant in order to prove some further alleged truth, in such case the torture shall be simple; for there can be no question as to the torture of the Vigil, because the Constitution promulgated by Paul V, of sacred memory, for the reformation of the courts of this city, stands in the way. This is contained among other Constitutions of the said Pope as the 71st in order, Tit. de Judic. Criminalib. which is § 10, n. 30; vol. 3 Bullar. page 108; by which it was decreed that this kind of torture cannot be inflicted unless these two requisites jointly concur, to wit: that the crime be "most atrocious"[2] and that the defendant be burdened with the most cogent suspicions of guilt.[3] So affirm Spad. cons. 114 [113], n. 4, lib. 1; Farinac. qu. 38, n. 71; Locatel. Quaestiones Judiciariae crimin. inspect. 1, n. 44; Guazzin. def. 30, cap. 21, vers. Et hic; Eusebius,[4] my predecessor in office, of most distinguished memory, in his Allegatio printed with Passerin. cap. 1, sub n. 70 in the beginning de homicidio in 6.

[1] i.e. that he confessed that he gave orders merely to disfigure his wife. See preceding § Si igitur and § Hoc sane, XXII, 22, Ch. VIII, sec. 66. [2] Mr. Hodell translates "very atrocious." Atrocior and atrocissimus applied to crimes were not mere adjectives but technical words indicating the grade of the crime as has been previously explained. See § Delictum autem, XXXVI, post sec. 4. [3] indiciis urgentissimis. No English word expresses the exact technical meaning of indicium which has already been discussed. It signifies an indication of guilt, or suspicion arising in the circumstances. [4] Eusebius de Eusebiis, referred to and commended by Raynaldus, Obs. cap. 34, n. 152.

AUTHORITIES

Spada, cons. 113, n. 4, styles the Vigil a most atrocious and intolerable torment and says it was prohibited in the time of Gregory XIII (1572-1585). Farinacius, qu. 38, n. 71, contains the description of the Vigil already quoted. Guazzinus, def. 30, ch. 21, n. 13, discusses it and the then recent Constitution of Paul V.

Section 3.

[Arch., Pam. 3, xliv, 43, § Si igitur poena.]

If then Blasius and his associates are not to be punished with the death penalty[1] for having aided in the homicides,[2] it is useless to inquire whether they can be subjected to the torture of the Vigil in order to get the actual truth from their own mouths; for this torture requires two essentials, first, that the most weighty indications of guilt[3] operate against[4] the accused, and second, that the crime is "most atrocious," according to the provisions of the Bull for the Reformation of the Courts, of Paul V, of holy memory, § 10, n. 3; Scanarol. de Visit. Carcerat., lib. 2, § 6, cap. 4, num. 13; and before him Cartar. de mod. Interog. Reor., lib. 4, cap. 2, n. 7 and 8; Baiard. ad. Clar., § fin. quaest. 64, post num. 105; Farinac. quaest. 38, num. 71; Guazzin. defens. 30, cap. 21, n. 13, in princip. vers. Et non debet, and vers. In hac Curia.

[1] poena ultimi supplicii. [2] Here as throughout Mr. Hodell translates homicidium as murder. [3] indicia urgentissima. [4] militent: to fight as a soldier: wage war against.

Authorities

Scanarolus, de Visitatione Carceratorum, b. 2, § 6, ch. 4, n. 13, referred to in preceding chapter. Chartarius, also there cited, gives the formula for the torture of the Vigil, dated in 1587, before the Bull of Paul V. Baiardus ad Clarum, qu. 64, n. 105, contains nothing of special importance and the citations from Farinacius and Guazzinus are also contained in Spreti's argument § Quatenus vero, above.

Joannes Baptista Scanarolus was Prefect of the Archfraternity of Charity, and for thirty-five years a member of the Visita or "Board of Inspection," the body charged with the oversight of the Prisons in Rome and possessing extensive powers. This is an admirable and very interesting work, containing a full account of the regulations concerning prisons and prisoners, some statistics, and a description of the torture of the Vigil, with an illustration of it on p. 43 of the Appendix. Scanarolus was evidently a man of high character, much industry, and great learning. My copy was published at Rome, Typis R. C. A. 1675.

Section 4.

[Spreti, Pam. 2, xxxvi, 34, § Delictum autem.]

But a crime is said to be "most atrocious" only if it is one for which a penalty more severe than mere death should be inflicted,[1] such as cutting into pieces,[2] burning, and the like. Farinac. qu. 18, n. 68 [88]; Carpzov. pract. Crimin. par. 3, qu. 102, n. 62; Scanarol. de visit Carcer. lib. 2, § 6, cap. 4, n. 14, pag. 291; Campan. Resol. 2, n. 28; Polic. de Reg. audien. tom. 1, tit. 3, cap. 2, n. 62; D. Rainald. Observ. par. 3, cap. 84, § 6, n. 4, [cap. 34, § 12, n. 146?]. And this kind of death, as ignominious, and involving infamy, has decidedly no place with the nobility, Leg. moris est, 9, § Sed enim ff. de Pen. [Dig. 48, 19, 9, 11]; Gloss. in l. desertorem, 3, § torquentur, and thereon Bartolus ff. de Re milit. [Dig. 49, 16, 3]; said Bartolus in l. capitalium, § servi caesi, ff. de Poen. [Dig. 48, 19, 28, 4]; Cassan. in Catal. Glor. Mundi, par. 8, consider. 33, vers. Hinc etiam est; Farin. quaest. 98, n. 98; Covarr. variar. lib. 2, cap. 9, n. 4. Hence it is much less so here, because there is no question here as to the death penalty, which does not enter into the present case from what has been shown above; and Gabrielius remarks on this point to the effect that a crime of this kind may not be said to be aggravated.[3] Gabriel. [vol. 2] cons. 187, n. 12 and 13, lib. 2.

[1] venit imponenda. See as to this use of venire, Appendix 4. [2] scissionis frusta. Mr. Hodell translates, "useless mutilation" as though the word was frustra. [3] qualificatum.

Authorities

Farinacius, qu. 18, n. 88; Carpzovius, Pract. crim., part 3, qu. 102, n. 62, and Scanarolus, book 2, § 6, ch. 4, n. 14, are cited in the preceding chapter. Campana, Res. 2, n. 28 and Raynaldus, Obs. ch. 34, § 12, n. 146, give the general principle only. Dig. 48, 19, 9, 11; the text is:

Sed enim sciendum est discrimina esse poenarum neque omnes eadem poena adfici posse. Dig. 49, 16, 3, Gloss on word torquentur, as to punishment of soldiers, who are not to be tortured, says that hanging is reserved for plebeians. Chassaneus, Catalogus Gloriae Mundi, Part 8, on Nobility, Consid. 33. Hinc etiam est quod ex consuetudine nobiles non suspenduntur sed decapitantur, etc. Farinacius qu. 98, n. 98: noblemen and those placed in dignity are by no means to be punished with a disgraceful punishment, as for example scourging, the pillory or the like ignominy. Covarruvias, Variae Resolutiones, 2, ch. 9, n. 4, says that noblemen are not to be tortured or subjected to ignominious punishment. Gabrielius, Vol. 2, cons. 187, n. 12 and 13, a case of uxoricide, cites the l. Gracchus and says "nam in hac materia illud delictum qualificatum censetur, cujus poena augetur propter qualitatem," apparently meaning that as the quality of a crime is determined by the punishment prescribed for it, that crime which is not subject to the death penalty cannot be said to be aggravated or "most atrocious."

Section 5.

[Arch., Pam. 3, xliv, 43 § Et licet amplissimae.]

And although the discretionary powers[1] of this tribunal are very extensive for dispensing with one of the said requisites,[2] yet I have never seen the said torment of the Vigil inflicted except where there is no doubt that the crime, as to which the Fisc contends that a confession be elicited from the accused, deserves the extreme punishment of death.[3]

[1] facultates. [2] uni ex dictis requisitis. [3] poenam ultimi supplicii.

Section 6.

[Arch., Pam. 3, xliv, 43, § De qua agi.]

We cannot believe that this argument is made by reason of the alleged conventicle; since those who are assembled are not subject to any penalty for the conventicle, but only he who assembled them, as Baldus excellently asserts. Bald. in cap. quae. causae, n. 13, vers. Tu dic de his, quae vi metusque caus.; Farinac. qu. 113, n. 140.

AUTHORITIES

Farinacius. qu. 113, n. 140. The ordinary penalty for conventicle, both as against the State and another person, applies to him who was the author and contriver of the said conventicle and illegal assembly; not to him who was not the author of it, but one of the assembly, for he is punished with a milder penalty than the principal who collected and contrived the assembly; but this penalty is at the discretion of the judge.

This section is repeated in the Argument pro Sociis, Ch. XI, sec. 21.

SECTION 7.

[ARCH., PAM. 3, XLIV, 44, § NEC IN HOC CASU.]

Nor in this case can the penalty for the asserted conventicle be applied[1] with respect to Count Guido because the reason for which he assembled the men enables him[2] to escape the penalty, since one may lawfully call his friends and companions together to restore his own reputation. Marsil. in l. 1, n. 13, C. de Rapt. Virgin. [Cod. 9, 13]; Paris. cons. 154, n. 7 and 15, p. 4; Farinac. d. qu. 121, n. 87; Baiard. ad Clar., § Homicidium, n. 195, 196, and 197, vers. Et etiam potest alios congregare, and others above cited.

[1] tractari. [2] suffragetur, votes for him.

AUTHORITIES

Parisius, part 4, cons. 154, n. 7. Moreover a husband may assemble his friends and other relatives to be present at the homicide but not so that they themselves accomplish it. Farinacius, qu. 121, n. 87. Much more may a husband call together his own son and even others, strangers, for the purpose of helping him in killing a baseborn adulterer. Baiard. ad Clarum, § Homicidium [n. 185] to the same effect, but the citation seems erroneous.

This section repeated, Ch. X, sec. 3.

SECTION 8.

[ARCH., PAM. 3, XLVI, 45, § LICET PER CONSTITUTIONES.]

Although by special[1] constitutions and Banns the penalty [for carrying prohibited arms] has been

increased to the highest point, yet this kind of increase[2] does not alter the nature of the crime. And just as, according to the common law, torture is not inflicted for obtaining the truth from those suspected[3] of said carrying of arms, on account of the insignificance of the crime, Farinac. qu. 42, n. 7; so it cannot be inflicted by force of the Constitutions and Statutes which have increased the penalty, as is well shown by Bald. in l. si eum in ultima lectura, n. 2: ff. si quis caution. [Dig. 2, 11]; Cavalcan. de Brach. Reg. part 3, sub n. 258; vers. Tamen supradixi; Guazzin. defens. 30, cap. 3, sub n. 3, vers. Plus dicit.

[1] particulares. [2] Increase, that is, of the penalty. [3] indiciatis. Mr. Hodell translates "indicted" as though indictatis from indictare, accusare, DuCange, s.v.; but indiciatus means one against whom there are indicia or preliminary proofs arousing suspicion.

AUTHORITIES

Farinacius, qu. 42, n. 7. Torture is not to be inflicted in light crimes, among which he instances, throwing stones at one, going out at night without a light, striking with the fist, and carrying arms. Cavalcanus de Brachio Regio, p. 3, n. 258, states the rule that torture cannot be inflicted when the punishment for the offense would be only a pecuniary fine and not corporal, because torture would be in effect equivalent to corporal punishment; and then adds the converse case: "And when by the common law the punishment would be corporal (as that which is imposed on a blasphemer) and by statute law it is changed to a fine, nevertheless torture cannot be inflicted." He quotes Baldus, cited by Archangeli, and other authorities. Guazzinus, defens. 30, ch. 3, n. 3, citing Moder. Roman., "he further says that this is still true although by virtue of some statute a corporal punishment is imposed."

SECTION 9.

[ARCH., PAM. 3, XLVII, 45, § ET IN TERMINIS.]

And that this is true in the case[1] of the torment of the Vigil, which cannot be inflicted for a crime that is not in its own nature "most atrocious," but is considered as such by force of a Constitution[2]

so far as the penalty is concerned, unless the nature of that crime be expressly changed also in regard to the method of procedure;[3] see D. Raynaldus in his Observ. Crimin. cap. 5, § 1 to § 3, n. 125, et seq.

[1] in terminis. [2] vigore constitutionis, not decree, as Mr. Hodell translates. [3] circa modum procedendi. Mr. Hodell translates: "unless indeed the nature of the crime is changed according to the method of proceeding in it." Circa = about, in its several English meanings. "The method of procedure" refers to torture, which in theory was procedural.

AUTHORITIES

Raynaldus, Obser. ch. 5, § § 1 to 3, n. 125. "For whenever a crime is not of its own nature 'most atrocious,' it can never be said to be such by reason of an increase of the punishment effected by a new Constitution of the Prince; for although the Prince can make that a crime which is not a crime; and add to homicide the quality of assassination or of any other crime whatsoever, which transforms it and turns it into a new species, yet he does not by this change the method of procedure, because ordinances of this sort are understood only to change the laws in respect to the punishment, but not in procedure or torture, when previously the crime was not such that the defendant could be tortured for it."

If according to the authorities cited the punishment determined the grade of the crime as "most atrocious" or not, why should not torture follow? I suppose the answer may be that a sentiment of public policy was growing in favor of restricting torture; so that in new cases it was inflicted only where it was expressly permitted. See next section, § Et videmus.

SECTION 10.

[ARCH., PAM. 3, XLVII, 45, § ET VIDEMUS.]

And we see in the Banns of my most Illustrious Lord,[1] when he decreed[2] that it should be possible to proceed with the torment of the Vigil in cases in which according to the [common] law[3] it was not possible so to proceed, that he expressly declared this, which he certainly would not have done, if such torture could have been inflicted in cases of crimes not capital according to the [common] law,[3] but to be expiated with the

extreme penalty of the law,[4] by the [mere] force of the Banns.

[1] i.e. the Governor. I have not been able to find these Bannimenta. [2] Ubi voluit posse procedi. The translation of this section differs from that of Professor Hodell. Voluit, for example, does not mean "wished" in such connection. [3] de Jure. [4] poena ultimi supplicii; i.e., death.

II

THE ARGUMENT, AFTER THE DECREE FOR THE TORTURE OF THE VIGIL, AS TO THE EFFECT OF THE FURTHER CONFESSIONS ELICITED

Section 11.

[Spreti, Pam. 9, cxxv, 133, § Confessiones D. Guidonis.]

The confessions of Count Guido Franceschini and of Domenico Gambassini, Francesco Pasquini, and Allessandro Baldeschi,[1] his companions, are null; and therefore should be given no consideration, inasmuch as they proceeded from fear of the rigorous[2] torment of the Vigil which was unlawfully decreed against them. Bertazzol. cons. crim. 341, n. 32; Giurb. cons. 8, n. 19; Hect. Foelic. allegat, 106, n. 1; Matthaeu, de re Crimin. controv. 27, n. 26; and this is true although they have still perhaps persevered in the same confessions. Paul de Castr. consil. 273, n. 1, vol. 1.

[1] Blasio Agostinelli is omitted here. The Fisc was satisfied with his first confession, and he was not included in the decree for the infliction of torture by the Vigil. [2] rigorosi tormenti.

Authorities

Bertazzolius, cons. 341, n. 32. And when any one should not have been tortured, and confesses under torture, such a confession is worthless. Giurba, cons. 8, n. 19, and Hector Felicius, Part 2, Alleg. 106, n. 1, to the same effect, the latter adding even if the torture was ordered by a judge having liberum arbitrium, i.e., full discretion, and the

confession was afterwards ratified. Matthaeu et Sanz, cont. 27, n. 26; he who is unjustly tortured, even if he confesses the crime ought to be discharged, because such a confession cannot injure him since it is of no efficiency. Paulus de Castrensis, vol. 1, cons. 273, n. 1, supports the text.

Section 12.

[Spreti, Pam. 9, cxxv, 133, § Ut enim dicebamus.]

For as we said in our past argument, now, with your leave, to be resumed, the Constitution of Paul V, of sacred memory, promulgated concerning the reformation of the Tribunals of the City (which is in order No. 71, title de Judic. Criminal., that is § 10, number 30, vol. 3 of the Bullarium Novum page 198),[1] commands that this form of torture be not inflicted except under two jointly concurrent circumstances:[2] the first, that the defendant be burdened by the most cogent suspicion;[3] the second, that the crime be "most atrocious;" and the authorities cited in my said argument, § Quatenus vero Fiscus [xxxv, 34] are witnesses as to the practice.[4]

[1] 3 Mag. Bull. Roman. p. 268. [2] duobus copulative concurrentibus. [3] indiciis urgentissimis. [4] Ante, sec. 2.

Section 13.

[Spreti, Pam. 9, cxxv, 133, § Neque vero suffragari.]

Nor indeed can the asserted discretionary powers[1] of this tribunal support this,[2] because whatever they may be, they have no application except in respect to crimes that should be punished with death, D. Raynald. Observ. par. 1, cap. 5, § 1, ad tertium, n. 121, etc.; where he gives the reason, [namely] because whenever the defendant should not be condemned to death, he should not for the purpose of obtaining a confession from him be

exposed to a torture which can cause death, just as it did almost cause death in the case of Allessandro who fainted dead away[3] through two applications[4] of the said torture.

[1] facultates. [2] suffragari. [3] lethaliter defecit. [4] per duas vices in eodem tormento. Literally, two turns. See Secondary Source of The Ring and the Book, Hodell 213, Everyman, 265, which, however, speaks of the Cord, not of the Vigil. Mr. Hodell in Everyman, Introduction xiii, thinks this means "till he fainted twice." Browning says: —

"So two successive days he fainted dead,
And only on the third essay gave up." R. and B. 8, 346.

See on this point, A K. Cook, App. VI. The torture of the Vigil could not be administered twice on the same day, and in this Browning would be right. For vices, meaning "turn" in this sense, as when we say: "It's my turn," etc., like the French fois, cf. Horace, Od. 4, 14, 13, plus vice simplici, more than once (T. H. Key's Dict.); and Italian vicenda, in Hoare's Dict. Same meaning of *vices* in torture in Scanarolus de Visit. Carcer., Book 2, § 4, ch. 3, n. 276; Chartarius, b. 4, cap. 1, n. 131; Novellus Tract. crim. 99.

AUTHORITIES

Raynaldus, Observ. ch. 5, § 1 to § 3, n. 121, supports the text as quoted. The argument in this section is answered by Bottini, Pam. 13, CLXII, 171, § Redarguit D. Meus, post sec. 29.

SECTION 14.

[SPRETI, PAM. 9, CXXV, 133, § Delictum autem.]

But the crime which has been charged against Count Guido and his companions, and which they themselves have confessed, was shown at large in our former argument to be neither of the first nor second kind.[1] And indeed since Count Guido was led to kill Francesca Pompilia, his wife, and Pietro and Violante, his parents-in-law, or to cause them to be killed, by reason of causa honoris, namely, on account of the adultery which the said Francesca Pompilia committed with the connivance and the assistance of the others; this [causa honoris]

relieves from the penalty of death not only Guido himself (according to the Texts and the authorities cited in our said argument, § Hoc stante [XXV, 27] with the following sections connected therewith, § Praedictis nulletenus [XXXII, 32] and the sections following), but also his companions according to the authorities likewise cited in our said argument, § Quae dicta sunt [XXXVI, 35] with the three following sections.

[1] That is, possesses neither of these essentials, being neither "most atrocious" or indicated by strong suspicion; not "murder neither of the first or second degree," as Mr. Hodell translates. This section will also be found with fuller notes in the general argument, post, Ch. XI, sec. 9. It is repeated here to make the argument about torture continuous.

Section 15.

[Spreti, Pam. 9, CXXVII, 134, § Sed ad quid.]

But why should I now dwell upon those things that have already been said,[1] when there is such conclusive proof[2] of the said adultery and even of further dishonor of the said wife, from so many important matters brought out in the present stage of the case and very well examined by my colleague, the Procurator of the Poor, in his customary manner (which indeed to avoid useless superfluity I do not here repeat), so that there remains no room for doubt concerning the causa honoris, which really drove Count Guido to commit the crime; for it would be sufficient that a cause of this kind should be verified[3] even after he had committed the crime as Bertazzolius advises on this point, cons. Crimin. 42, lib. 1; Matthaeu de re crim. contr. 12, n. 15, etc.; Dond. consult. 97, n. 16, in fine; Muta dec. Sicil. 61, n. 12; Dexart. dec. Sardin. 5, n. 15.

[1] in praemissis. [2] concludenter constat. [3] verificaretur.

AUTHORITIES

Bertazzolius, book 1, cons. 42, is the case cited in § Alii vero. CXXXVII, 142, Ch. VIII, sec. 8. Dondeus, cons. 97, n. 16, a case of uxoricide, honoris causa ex intervallo, says that detection in the act is not necessary if the adultery is manifest from a violent presumption or unquestionable proof. This case is often cited. Muta dec. Siciliae, 61, n. 12, the case of Leonardus, uxoricide committed after an interval, the guilt of the wife being clear; a decision also often cited.

SECTION 16.

[SPRETI, PAM. 9, CXXVII, 135, § ULTERIUS NON EST.]

Still less is there now[1] any need to dwell upon those things that have already been said, because Count Guido has in his confession clearly expressed his causa honoris as indeed respecting[2] not only his wife but also his parents-in-law, especially at page 98, where we read: "Thereupon followed her elopement which was so disgraceful not merely to my house, which is noble, but would have been so to any house whatever, even of low estate. She made this elopement by night with the Canon Caponsacchi and his companions.[3] In the progress of her flight along with the driver of the carriage, she was seen by the said driver kissing and embracing the aforesaid Canon. Still further, I found out that they slept together at Foligno in the post house and then again at Castelnuovo. By such proof she stands convicted as an adulteress, not merely for this, but for like excesses which I have since heard that she committed in Arezzo with other persons." And on page 672 (reverse) where we read: "And when the said Santi was asked whether he would give aid in attacking the Comparini because of my honor and the plots they had made against my life, Alessandro responded that he would do it, and if some one else were necessary that he would find him.

Accordingly, after a few days, I received in my home Biagio who has been twice named above, in company with the above said Santi, and he said that he also would assist in it, as being specially a question of my honor and the contrivance against my life." And on page 678: "And while we were staying in the same vineyard, that is in the house within it, we spoke of various matters and particularly of what was to be done, namely, of the attacks to be made upon the Comparini (that is, upon Pietro, Violante, and Francesca my wife) and of wounding them because they had taken away my honor which is the chief thing, and had also plotted against my life." And on page 683 (reverse) at the end: "And I would have so much to say that one might write from now till tomorrow morning, if I wished to tell all the trouble and expense I have suffered from the said Camparini. But all this would amount to nothing, if they had not touched my honor and plotted against my life." And on page 684: "The Santi above named was a laborer of mine at my Villa of Vitiano and consequently was informed of all these troubles I had suffered at the hands of the Comparini. He also knew of the very indecent elopement in the manner elsewhere told. The above said Alessandro then began of his own accord to seek me out, and did find me so that he might give aid in the event that I should wish to avenge my honor and the plots which they had made against my life." And on page 699: "And she together with Canon Caponsacchi were overtaken by me at Castelnuovo where they were arrested by the officers and conducted to these prisons. In the Court many a time I laid stress on their crime of "child substitution"[3] in order that they might be punished. I,

never having seen what would be considered expedient in an affair of such importance to my honor, was obliged to take some resolution for recovering it, because the Comparini with greatest infamy, had transferred to me their own ignominy." And on page 720: "And what I said to Alessandro, Biagio, and Domenico, I also said to Francesco once when he, knowing the offense against my honor, which I had suffered, asked me if I was ready to give a beating to my said wife and I replied to him that she deserved not merely a beating but death."

[1] modo. [2] causam * * respicientem * * uxorem. Respiciens, participle, used as preposition; regarding, respecting, as in English. [3] parto supposito; not "supposed conception" as Mr. Hodell translates. This means the substitution of a child at birth; child substitution. Parto supposito is the equivalent of the Latin partus suppositus; see note to § Credidit inflex, XIX, 20, Ch. IX, sec. 4. This and the following section are replied to by Bottini, § Ex his cum, CLXXXI, 187, post. sec. 32.

Section 17.

[Arch., Pam. 8, ci, 109, § Confessio D. Guidonis.]

The confession of Count Guido and his associates regarding the homicides of Francesca, his wife, and of Pietro and Violante Comparini, his father-in-law and mother-in-law, is so far from supporting the Fisc in demanding the ordinary penalty [of death] that it is, on the contrary, remarkably in our favor for the exclusion of that penalty; for there can be no longer any contention as to the cause of the homicides, namely, the causa honoris. This was at first denied by the Fisc, because of the concurrence of other causes, though these were either insufficient or were directly[1] hurtful to Guido's honor, so that we shall go over them hereafter not with unwashed hands;[2] for a confession should be received along with all its

qualifications[3] and it is not allowed to be divided[4] for the purpose aforesaid.[5] Menoch. de Arbitr. cas. 279, n. 6, etc.; Clar., § fin. qu. 55, n. 16, vers. Forte posset; Gomez. var. resol. tom. 3, cap. 3, n. 26, post medium, vers. Unum tamen est; Farinac. qu. 81, n. 157; Guazz. defens. 32, cap. 35, n. 1, vers. Sed contrarium, and n. 2; Sperell. dec. 64, n. 16, par. 1, and dec. 108, n. 36, and dec. 136, n. 27, par. 2.

[1] De directo, Mr. Hodell translates "indirectly." The thought is that the other motives for the crime were either so trivial as to be disregarded, or such as were likewise offensive to the sense of honor. De directo in this passage might possibly be translated justly or rightfully. [2] illotis manibus, i.e., without due preparation. Cf. Dig. 1, 2, 1. [3] cum omnibus suis circumstantiis. [4] scindi, split. [5] ad supradictum effectum: i.e., for the infliction of the death penalty. Mr. Hodell, however, translates: "according to a preconceived purpose." Effectum means in the O. Y. B. either purpose or effect. It may here be translated "with the aforesaid effect."

AUTHORITIES

Menoch. de. Arbitr. cas. 279, n. 6 and 7, discusses the frequent case of a homicide confessing the crime, but alleging self defense, and endorses the opinion that the confession being taken as a whole the defendant should be punished according to the discretion of the judge. Gomezius Var. Resol., book 3, ch. 3, n. 26; by a confession that is not pure, simple and absolute, but qualified and modified, the proof is rendered dubious and uncertain, and the ordinary penalty should not be imposed. Clarus, § fin., qu. 55, n. 16, to the same effect. In n. 15, however, he calls the doctrine of qualified confession "extremely perilous." See § Ex his cum, CLXXXI, 187 post sec. 32. Farinacius, qu. 81, n. 157, holds that a qualified confession relieves from the extreme penalty and so argued in cons. 187, n. 5, in behalf of a minor. The decisiones of Sperellus support this view. Guazzinus, def. 32, ch. 35, n. 1, gives the authorities on both sides and again refers to them in def. 30, ch. 7, n. 5. Matthaeu et Sanz. contr. 18, n. 60, advocates the milder view of qualified confession, favoring the opinion of Gomezius and Farinacius. S. Rotae Romanae Recen. decis. part 13, dec. 308, n. 9, says flatly that the confession must be accepted with the qualification.

SECTION 18.

[SPRETI, PAM. 9, CXXIX, 136, § HUJUSMODI ENIM.]

For a confession of this kind should be accepted with its own qualification, which the Fisc cannot

split up and separate from it according to the well-known theory[1] of Bartolus in l. Aurelius, § item [idem] quaesiit ff. de libert. leg.; Farin. cons. 67, n. 8, and cons. 187, n. 5 and qu. 81, n. 157; Vermigl. cons. 282, n. 8; Guazin. def. 30, cap. 7, n. 5, and defens. 32, cap. 35, n. 1, vers. Sed contrarium, and n. 2; Matthaeu, de Re Crimin. contr. 18, n. 60; Trivisan. decis. 46, n. 32, lib. 2, where it is shown that the distinctions which are accustomed to be drawn by some hold good in civil, but not in criminal cases. Sperel. dec. 64, n. 16, and dec. 108, n. 36, and dec. 136, n. 27; Rot. coram Merlin, dec. 103, n. 2, and Recen. decis. 308, n. 9, part 13, and decis. 57, n. ult. part. 17.

[1] Ex vulgata theorica, Bart. in l. Aurelius. Not "according to the usual theory," as Mr. Hodell translates. This was one of the battle grounds of the Doctors, and Spreti is arguing against the familiar or well-known theory laid down by Bartolus. This celebrated jurist was born 1313 and died 1357, though these dates are challenged. He was chancellor to Charles V, and his commentary on the Corpus Juris was regarded as of equal authority with the text, the proverb being "Nemo jurista nisi sit Bartolista." See Great Jurists of the World, Continental Legal History Series; Sidney Woolf, essay on Bartolus of Sassoferrato, Cambridge, 1913; Colquhoun's Summary, § 155.

AUTHORITIES

The "well known theory" of Bartolus is contained in his commentary on the l. Aurelius, § idem quaesiit ff. de libertatione legata, Dig. 34, 3, 28, 12, where he says, "hence if you should confess that you have killed a man in your defence, I can stand on your confession in so far as you say that you killed him; but I am not bound to stand on it, in so far as you say 'in your defence' because the presumption of the law is against you." This doctrine was a favorite subject for debate in all of the books.

Farinacius, cons. 67, n. 8, a decision of Blanchettus in the Rota, A.D. 1581, that a confession cannot be divided; cons. 187, n. 5, "nor does it matter that this mitigating circumstance of provocation, which is not proved, can be impugned by the Fisc, for; whether it be proved in the proceedings or not, a prudent judge will very carefully examine it, although there were only exhibited the confessions of the defendants; but whenever the confession be qualified, although the added qualification be not proved, it is not sufficient to condemn the defendant to the

ordinary penalty." Farin. qu. 81, n. 157, cited in § Confessio D. above, to the same effect, that the punishment should be extraordinary according to the discretion of the judge; indeed, he says this was the original doctrine, and among modern practitioners is regularly observed, for where a man's life is in question we should follow the milder opinion. See also Martinus, Praxis Criminalis, 242.

Vermigliolus, cons. 282, n. 8; he who confesses with a qualification that excludes the crime is considered as denying it. Guazzinus, previously cited, says this is the more common and practiced opinion. Merlin. dec. 103, n. 2; a confession should be accepted as a whole. Recent. dec. part 17, dec. 57, n. 7; since the said confession appears qualified, it cannot be divided by accepting only the favorable qualifications and rejecting the contrary according to the well known doctrine (vulgata doctrina) of Bartolus in l. Aurelius.

The argument is replied to by Bottini, § Ex his, post. sec. 32. No uniform rule can be drawn from the authorities. The great influence of Bartolus led many writers to support his theory; but those of later date dissented from its severity. Perhaps one of the fullest discussions, at least a good résumé of the decisions, may be found in de Caevallos Speculum Aurem Opinionum Communium contra Communes, qu. 362, n. 10, where he treats of the case put by Bartolus. Caevallos does not state his conclusion clearly but apparently he thought the weight of authority was strictly in favor of the opinion of Bartolus, though recognizing the leaning of the more modern writers towards the imposition of the milder punishment. Trivisanus, dec. 46, n. 32, says positively that this is the common opinion in criminal cases, and so Sperellus dec. 108, n. 36 and 136, n. 27, when a man's life is at stake.

Section 19.

[Spreti, Pam. 9, cxxix, 136, § Indubitanter quando.]

This is undoubtedly true, when, as in the present case, the argument concerns its effect[1] for the infliction of the ordinary penalty [of death], whatever may be otherwise said according to some authorities concerning its effect for the infliction of an extraordinary penalty. Abb. in cap. Auditis, n. 32, vers. Putat tamen, de praescript.; Vermigl. cons. 325, n. 6; Bertazzol. cons. crim. 27, n. 2, lib. 1 and cons. 449, n. 30 and 31, and cons. 450, per tot. lib. 2; Farin. qu. 81, per totam, and especially n. 112, and 157; Gomes. Var. resol. tit. de homicid

cap. 3, n. 26; Foller, verb. Et si confitebuntur, n. 46; Ludov. decis. Lucens, 19, per totam, and especially n. 12, where he extends this conclusion to all qualified confessions in every kind of crime.

[1] That is, the effect of a qualified confession as a whole.

AUTHORITIES

Vermigliolus, cons. 325, n. 6; when a qualified confession is divided it is not sufficient for the imposition of the ordinary penalty. Follerius, Pract. crim. Part. 3, n. 46, to the same effect. Bertazzolius, cons. 27, n. 2. The confession of the defendant in a case of homicide, included the qualification of self defense, and there were no other witnesses. Bertazzolius, for the prisoner, admitted that the confession could be divided and accepted in part, but claimed that a milder penalty should, according to the common opinion, be substituted for death. The defendant was sentenced to be hung, but just as the executioner had the noose ready (jam carnifex ornaverat laqueum) the judge changed his mind and commuted the sentence to a fine, or the galleys in default of payment. Bertazzolius, cons. 449, n. 30, and cons. 450, are similar cases but the decisions are not given. Farinacius, qu. 81, and Gomezius, Var. Resol. tit. de homicidio, ch. 3, n. 26, are cited in section 17 above. Ludovicus, dec. 46, an interesting case, too long to quote fully, supports the text.

SECTION 20.

[SPRETI, PAM. 9, CXXIX, 136, § PRAESERTIM QUANDO.]

This is true especially when the qualification is not merely supported[1] by other testimony but is conclusively[2] justified. Vermigl. cons. 282, n. 12, cons. 431, n. 7; Ciriac. contr. 637, n. 7; Farinac. qu. 103, n. 157; Angel. de Confess. lib. 3, qu. 11, n. 24. For besides the said decree, and the other matters previously considered, we have his associates in the crime expressly testifying that they had been sought out by Count Guido in order to commit the crime, in company together with him,[3] for the cause aforesaid [causa honoris], especially Blasio Agostinelli, page 316, where he says: "Signor Guido told me that his wife had fled from him in company with an Abate [sic] and had carried away some money and jewelry. He led me into the

very room where she had robbed him of the said jewelry and money,[4] and told me he wished to go to Rome to kill his wife and that he wished that I and the said Alessandro would go with him," etc. And page 317: "At the above time the said Guido told me that his wife, for the purpose of fleeing securely with the said Abate, and that he might not perceive it, had mixed an opiate in the wine for dinner to put him and all the rest of them to sleep. He also said that he was in litigation with his father-in-law, who had not merely sworn that the said wife was not his own daughter, but still further had received her back into his home, after she had run away from her husband, although he would have put her in a monastery after he overtook her at Castelnuovo during the elopement." And Alessandro Baldeschi, page 623: "The said Guido in the presence of myself as well as that of Biagio, Francesco, and Domenico told me that he ought to kill the lady, that is, his wife, who was here in Rome, to recover his own honor; and also to kill the father and mother of the said wife, because they had lent a hand in the insult she had offered to his honor." And page 645: "He told us also, in the presence of the keeper of the vineyard, that he was obliged to kill his wife, his father-in-law and his mother-in-law, because the latter had lent a hand to their daughter in her illdoing and acted the ruffians too, and because the said Guido also declared that these same people whom he had to kill had wished to have himself, that is, Guido, killed."

[1] Aliunde non solum adminiculatur. Mr. Hodell translates: "not merely propped up in some other way." Adminiculum is used technically of the support afforded by indicia or suspicious circumstances. [2] concludenter. [3] ad una cum ipso delinquendum. [4] The very room. How amusing and how common is this method of "lending verisimilitude to an otherwise bald and unconvincing narrative."

AUTHORITIES

Cyriacus, contr. 637, n. 7 [contr. 637, n. 74, vol. 4] quoted by Angelus below.

Farinacius, qu. 103, n. 157. Nor can it be said in behalf of the Fisc that the confession should be accepted and its qualification rejected, for whenever there are concurring presumptions in behalf of the qualification in connection with the confession, the confession cannot be accepted without the qualification. Vermigliolus, cons. 282, n. 12, and cons. 431, n. 7, to the same effect. Angelus, de Confess. book 3, qu. 11, n. 24; unless the qualification be otherwise proved or at least have probable presumptions in its favor. Angelus examines the subject elaborately and here follows Cyriacus.

SECTION 21.

[SPRETI, PAM. 16, CCXXIX, 231, § CONFESSIO D. GUIDONIS.]

The confession of Count Guido with this qualification, that he had directed[1] the homicides by reason of the causa honoris, cannot be split up, but should be accepted by the Fisc with the said qualification, as we have shown in our argument, § Hujusmodi enim confessio [CXXIX, 136, ante sec. 18]. In fact, the authorities cited to the contrary by my Lord the Advocate of the Fisc apply in reference to a qualifying circumstance extraneous[2] to the confession itself, and only when the question concerns an extraordinary penalty, just as we also have admitted in our argument, § Praesertim [CXXX, 136, sec. 20].

[1] demandaverit; commanded or delegated, not demanded, as Mr. Hodell translates. [2] extrinseca.

SECTION 22.

[SPRETI, PAM. 9, CXXXIII, 139, § NIL AUTEM RELEVAT.]

Nor does it matter moreover that Count Guido in his said confession, besides speaking of his causa honoris, sometimes mentions also the cause

due to the plots which were being laid for his life, because, since this causa honoris was the strongest in his mind, as he himself asserts, page 678: "In consideration of the fact that they had taken away my honor which is the principal thing;" no consideration should be given to that other cause, since as it is so much weaker, it should be disregarded in comparison[1] with the aforesaid causa honoris, as was previously[2] proved in our former argument, § Et in omnem casum [XXXIV, 33], where in preference[3] to other authorities we have cited Mattheu. de re Crim. in cont. 11, n. 37, and the two following sections, speaking of this precise case.

[1] venit postponenda praedictae. Venire as an auxiliary. [2] praeventive. [3] prae caeteris, Mr. Hodell translates "for another purpose." The citation from Matthaeu et Sanz, cont. 11, is the case of Joannes Vecino, translated in Appendix 3. In the § Et in omnem, here cited, Spreti refers to this case of Matthaeu et Sanz, "optime in his terminis," Ch. X, sec. 29.

Section 23.

[Spreti, Pam. 9, CXXXIII, 140, § Et quatenus hanc.]

And so far as we care to consider this other cause also, it is equally sufficient for escaping the ordinary penalty. L. 1, Cod. quando lic. unicuique (Cod. 3, 27, 1); l. nec. timorem 7, vers. Timuit enim mortem, and vers. Ideo justus fuit timor, ff. de eo quod metus Caus. [Dig. 4, 2, 7, 1]; Innoc. in cap. Si vero 3, sub n. 1, de sent. excomm.; Bertazzol. cons. Crim. 433, n. 4 et seq. and cons. 434, n. 22; Thob. Non. cons. 109, n. 6; Cepol. Crimin. 41, n. 10, as far as the end; Farin. cons. 35, n. 22; Cyriac. contr. 105, n. 73 et seq.; Boer. dec. 169, n. 2.; Grammatic. dec. 5, throughout; Baldax. de Angel. in Addit. ad Gizzarel. dec. 5, n. 6.

AUTHORITIES

Bertazzolius, cons. 433 and 434. In this case the defendant homicide had been threatened a few months before he had been actually assaulted and wounded by the man whom he killed; but the cases cited mitigate the penalty when threats alone are uttered. Farinacius, cons. 35, n. 22, is a similar case. In the syllabus Farinacius speaks of it as one of necessary defense. Cyriac. contr. 105, cited in § Et idem, XVI, 17, Ch. VIII, sec. 19 and § Et non semel, XXII, 22, Ch. IX, sec. 13, not much in point here. Boerius, dec. 169, n. 2. Words are to be redressed with words, arms by arms. He quotes the proverb: if you say what you like, you will hear what you don't like. The decision in this case seems to be that one who avenges an insult by assault should be more mildly punished and not suffer death. Grammaticus, dec. 5, frequently cited in the O. Y. B. See § Cumque tum, CXVII, 125, Ch. IX, sec. 10. Cod. 3, 27, 1, and Cod. 9, 16, 3, on right of self defense against active aggression. The reference to Gizzarellus is not in point. Thobias Nonius, cons. 109, n. 16; the defendant slew his granddaughter detected in flagrante; the defense was that she had thus dishonored the family.

SECTION 24.

[ARCH., PAM. 8, CXVIII, 126, § UTRUMQUE SIT.]

Whether or not an allegation of this kind could perhaps have deserved some consideration before (as I have said above) the confessions of Count Guido and his companions were obtained, — for then the Fisc might be doubtful from what cause Guido could have been led to kill [Francesca and the others] — yet, after it is clear from the confessions of all of them that the causa honoris had provided him with the impelling motive and compelled him to kill, as Count Guido asserts, page 678, reverse, where we read: "To inflict wounds upon them inasmuch as they had injured my honor which is the chief thing;" in vain is the question asked whether he killed them for any other reason; wherefore, since it is clear that it was the causa honoris, the Fisc will never be able to prove that they were killed ex causa litis and not [ex causa] honoris, as is indispensably required in order that the penalty of the aforesaid Bull should

be incurred, as is said on this point by Mandos. cons. 61, n. 1 to 3; Rota coram Puteo, dec. 97 and 98, book 1.

This section is repeated in the arguments as to Pietro, Ch. IX, sec. 19, and Aggravating Circumstances, Ch. X, sec. 27, where the notes may be found.

AUTHORITIES

Coram Puteo, dec. 97 and 98, is probably dec. 102, holding that in questions arising under the Alexandrine Bull where some other cause coexists, the burden of proof is on him who claims that the act was done ex causa litis.

THE ARGUMENT IN BEHALF OF THE FISC UPON THE QUESTION OF THE INFLICTION OF THE TORTURE OF THE VIGIL UPON GUIDO AND HIS ASSOCIATES

I

THE ARGUMENT AS TO THE DECREE FOR THE INFLICTION OF THE TORTURE

A. The defendants should be subjected to the Vigil. Section

1. It is sufficient, in view of the powers of the Governor, that the crime should be punishable with the ordinary penalty, even if by reason of the aggravating circumstances it were not "most atrocious," as in fact it is. 25

2. The fact that Guido is a nobleman does not prohibit the torture of the Vigil. Nobility affords no privilege as to the kind of torture, especially in case of "most atrocious" crimes. 28

II

THE ARGUMENT AS TO THE SUBSEQUENT CONFESSIONS

A. The position of the defendants stated. That the crime was "most atrocious" appears from the Fisc's argument treating of the qualifying circumstances; for this present argument it is sufficient that the crime is punishable with death. 29 30

B. As to the qualification in the confession. Section

1. The qualification (i.e., the claim of injured honor) annexed by Guido to his confession should be rejected and the confession divided. 32

2. Because otherwise a defendant might escape punishment as a witness in his own cause and be acquitted upon his own assertion. 34

Section 25.

[Bottini, Pam. 14, cxcv, 199, § Deducta per D.]

The matters elaborated by my Lord the Advocate of the Poor, for the defense of Count Guido Franceschini, who is accused of three homicides with very serious aggravations which increase the grade thereof, are not sufficient to prove, first, that he should not be punished with the ordinary penalty of the Lex Cornelia de Sicariis, so far as[1] he should be found to have confessed these crimes; and, secondly, that simple torture only should be inflicted in order to obtain the truth[2] concerning them, the torment of the Vigil being omitted. I shall attempt to show this, in my answer to each of these propositions, so far as the excessive scantiness of time permits, and in defending the rights of the Fisc, as the duty of my office, and the atrocity and the enormity of the crime, demand.[3]

[1] quatenus: or assuming that. [2] habenda super iis veritate; ablative absolute. [3] The rest of Bottini's argument from this point is devoted to a general discussion of the merits of the case, and at its conclusion he returns to the question of torture in § Ex his cum abunde, ccii, 206, which now follows.

Section 26.

[Bottini, Pam. 14, cciii, 206, § Ex his cum, vers. Ac propterea.]

And therefore it seems superfluous to argue about the kind[1] of torture, since in view of the well known discretionary powers[2] granted to the Most Illustrious Lord Governor, with these very urgent presumptions[3] concurring, (of which, as I hear, there is no doubt)[4] the crime is great enough[5] to be punished with the ordinary penalty, even if the qualifying circumstance of "most atrociousness"[6] were not present so that [according to the argument of the other side] the penalty should not be increased [also] on that account.

[1] de qualitate. [2] ex facultatibus. [3] urgentissimis indiciis. [4] Perhaps Bottini means, I hear there is no doubt in the mind of the court. [5] sufficiat delictum plectendum fore. [6] qualitas atrocissimi; Mr. Hodell translates: "special atrocity."

Section 27.

[Bottini, Pam. 13, cciii, 207, § Caeterum nec etiam.]

However,[1] this kind of aggravating circumstance also is not wanting, inasmuch as it results from the treacherous[2] manner of the crime, and from the charge[3] of laesa majestas, which is probable[4] in our case under three heads, namely, from an offense committed ex causa litis; from the assembling of armed men; and from the violation of the public security, because of the assignment of the home as a prison. For, according to the Apostolic Constitutions on the first and second points, the crime would be raised to such a grade;[5] and as to the power of the Prince[6] to do this, there can be no dispute, as is advised by Restaur.

Castald. de Imperat. qu. 110, cas. 291; and, with reference to similar Constitutions, by Spada, [Vol. 1], cons. 1, n. 34, who asserts in such a case, that so far as concerns all legal consequences, the aggravation of "most atrociousness," correspondent with such a crime, should not be thought to be called in question;[7] as in precise terms Spada, cons. 113 [114], n. 14 and 15, vol. 1, declares for the infliction of the torture of the Vigil.

[1] caeterum. [2] ex modo proditorio. [3] ex titulo. [4] verificabili. [5] ad talem speciem. [6] principis. Princeps in its regular meaning: the Sovereign or State. [7] This is an awkward passage. The text is: asserens in tali casu illud quoad omnes Juris effectus tale reputari (tale re putari?) non est in controversiam revocanda qualitas atrocissimi tali delicto conveniens. Mr. Hodell translates: "it should not be considered a matter of controversy that the qualification of special atrocity, which is in agreement with such a crime, is to be revoked;" which is contrary to Bottini's argument. Spada, cons. 1, n. 34, vol. 1, affirms the power of the Pope in his Bulls to raise a crime to the grade of laesa majestas. Spada says: "Ex dispositione enim istarum Bullarum et Constitutionum Apostolicarum crimina in eis contenta quoad omnes effectus Juris dicuntur vere crimina laesae majestatis." I suspect a misprint in this passage of Bottini's argument, or a mistaken reference. The reference to Restaurus Castaldus sustains the plenary power of the Sovereign. This section is repeated in argument on Aggravating Circumstances Ch. X, sec. 84.

Section 28.

[Bottini, Pam. 14, cciv, 207, § Qualitas vero.]

The qualifying circumstance of rank[1] indeed, which [as it is argued] does not permit the penalty of death to be increased in severity,[2] as generally takes place in "most atrocious" crimes, on account of nobility which should not be tarnished by such aggravated punishment as adds infamy — even admitting that this proposition be considered correct[3] — is no objection to recourse being had to

the infliction of the torment of the Vigil; because for this purpose the nature of the crime is alone considered without regard to the qualifying circumstance of rank,[1] which would prevent the execution of a punishment carrying infamy with it; otherwise noblemen could never be exposed to the torment of the Vigil, nor Priests and men in religion,[4] upon whom the penalty of infamy[5] is not inflicted. But nobility bestows no privilege as to the kind of torture, especially in the "most atrocious" crimes, as Garsias advises; Garz. de Nobilit, Gloss. 1, n. 17, and Farinacius testifies to the practice. Farinac. qu. 41, n. 76, etc.

[1] Qualitas personae. This might be translated as "the quality (rank) of the person," Guido being a noble, just as people say in the old English phrase "he belonged to the quality." But qualitas, while used of social rank as in § Justior enim, LXXI, 78, Ch. VI, sec. 71, and § Verum etiam, CCXLVI, 243 (Lamparelli), "inspecta qualitate personarum," means in general an attribute or characteristic especially as a modifying or qualifying fact, and this is its frequent use in the O. Y. B. Persona may be used in the sense of rank or dignity, see DuCange; or of person, as in English. [2] exasperari. In "most atrocious" crimes the penalty was often made more terrible through the manner of its execution as by burning or mutilation. See § Delictum autem, XXXVI, 34, ante sec. 4. [3] quatenus etiam verificaretur. Mr. Hodell refers this to the qualifying circumstances of Guido's rank, and translates, "so far as it proved." But Guido, whether a Count or not, was certainly "nobilis," the fact was not questioned. This clause refers to the proposition of law that precedes it. Bottini admits this so far as the argument is concerned, but shows that the exemption of the nobility from infamous or degrading punishments does not extend to the matter of torture, which technically was not punishment but procedure. Quatenus and verificaretur: see Glossary. [4] religiosi, not as Mr. Hodell translates, "men in religious office." [5] infamiae poena.

AUTHORITIES

Farinacius, qu. 41, n. 76, says that noblemen are subject to torture in Rome and the Ecclesiastical State, though in their case there is a strong presumption against the commission of crime by them, so that the indicia for torture should be stronger than in other cases.

Section 29.

[Bottini, Pam. 13, clxiii, 171, § Redarguit D. Meus.]

In the beginning of his recent argument my Lord Advocate of the Poor has criticized as unjust the decree of the Supreme Tribunal concerning the infliction of the torture of the Vigil upon Count Guido Franceschini and his associates, for the purpose of getting a confession of that most barbarous crime committed by them; and therefore he claims that the confessions proceeding from the fear of torture, and ratified in its absence,[1] as is customary, cannot injure the defendants. He attempts indeed to deduce the injustice of the said decree, not merely from the absence of the qualifying circumstance of "most atrociousness" according to the Constitution of Paul V, of blessed[2] memory, for the reformation of the Tribunals of the City, but also because[3] the penalty of death cannot be inflicted for the crime under discussion. And likewise [as he argues] the torment of the Vigil cannot be decreed even under the discretionary powers[4] granted to this tribunal, lest there may be greater severity in the procedure than in the sentence, as Canon Raynaldus advises: Observat. part 1, cap. 5, § 1, ad tertium, n. 121, etc.

[1] eo cessante. I think "eo" does not refer to torture, but to metus. Mr. Hodell translates; "after it was over." See as to ratification, Chartarius, B. 4, ch. 1, n. 140, etc. Martinus, Prax. Crimin. 237. [2] fel(icis) rec(ordationis) Mr. Hodell translates "of sacred memory" as though it were sac(rae) mem(oriae). This and san(ctae) mem(oriae) are often used. [3] ex quo. [4] ex facultatibus extraordinariis.

Authorities

Raynaldus, Observ. P. 1, ch. 5, § 1 to § 3, n. 121, etc., is cited by Spreti, Pam. 9, cxxv, 133, § Neque vero suffragaris, ante sec. 13 Bottini in this argument asserts that he has already in § Sed quatenus

CXCVII, 202, Ch. X, sec. 44, shown the crime to deserve the death penalty. He then discusses the case on its merits and returns in conclusion to the effect of the confessions in § Ex his cum exclusa, CLXXXI, 187, post sec. 32.

SECTION 30.

[BOTTINI, PAM. 13, CLXIII, 171, § IN FINE VERO.]

At the conclusion indeed of his said recent argument he also criticized me because, to the very great astonishment of himself and of others, I should have failed in my duty, namely, that of seeking the truth, in that I prepared [certain] arguments[1] for the defense of the rights of the Fisc which I did not communicate to him. I was thinking that he had complained quite enough about this matter orally, so that he could have spared us this fresh complaint, since it was not my business to communicate my arguments to him inasmuch as[2] he never communicated to me[3] the arguments — very learned according to his custom[4] — which he prepared for the defense; and I have thought it worth while[5] only to give this hint, lest I might seem to have failed in my duty and the respect with which I regard my Lord.[6]

[1] allegationes. [2] prout. [3] nunquam ab eodem * * informationes communes fiunt. [4] de more, Mr. Hodell translates "very learned indeed in their way." [5] quod solum innuere operae pretium duxi; Mr. Hodell translates: "but I assert only this that I have paid the price of much labor." [6] i.e. the Governor; but perhaps referring to "my learned friend." This complaint and counter complaint about failure "to serve copies" has a familiar modern ring. Spreti's complaint is in Pam. 9, CXXXVIII, 143, § Voluissem etiam, Ch. XI, sec. 28.

SECTION 31.

[BOTTINI, PAM. 13, CLXIII, 171, § PRAEMISSA PROPTEREA.]

Passing over, therefore, my personal defense[1] I proceed to the vindication of the decree of the

Court from the charge of injustice made against it and, — omitting any examination of the grade of the crime[2] whether, namely, it should be considered "most atrocious" which I have already abundantly discussed in my former answer, § Sed quatenus [CXCVIII, 202, Ch. X, sec. 44] with the following sections, where I showed[3] that this could be supported because of the attendant circumstances which aggravated the crime and raised it to that of laesa majestas by reason of the provisions of the Apostolic Constitutions and general Banns; — I think it is sufficient in my present argument to point out that for this offense the penalty of death should be inflicted; which I hope to demonstrate with little trouble, since, from the severer kind of torture actually decreed by the most upright Judges,[4] the applicability[5] of the said punishment is also to be presumed. And so since nothing new, whether of fact or of law, is brought forward which has not been already considered in the opinion rendered in the case[6] in connection with the decree awarding torture, and the confession of the defendants has since taken place, it is the duty of the Judges to pronounce sentence of execution of their well-merited punishment which has now for a long time been expected by everyone.

[1] apologia — not apology here, as Mr. Hodell translates. [2] omissa indagine qualitatis criminis. [3] ostendendo. [4] By the Bull of Paul V, 3 Mag. Bull, n. 30, p. 269, the Vigil could only be decreed by a vote of the Congregation; not by a single Judge. [5] poenae locum esse praesupponendum est. The argument does not seem very forcible. [6] in relatione causae pro decernenda torturam, Mr. Hodell translates, "in relation to the cause for decreeing the torture." The relatio causae was the report or opinion of a judge rendered upon a case before him. See Glossary.

Section 32.

[Bottini, Pam. 13, clxxxi, 187, § Ex his cum exclusa.]

Since for these reasons[1] the proof of the alleged adultery has been[2] excluded and entirely destroyed, no attention should be paid to the fact that Count Guido in his confession has set up the mitigating circumstance[3] of the causa honoris, not only as respecting[4] his wife but also his parents-in-law, and that this confession cannot be divided,[5] at least for the purpose of inflicting the ordinary penalty.[6] For besides what has been said,[7] authorities of great reputation[8] are not lacking who even affirm that a qualification to this end[9] added to a confession ought to be [entirely] rejected, and above the others Bartolus, in l. Aurelius, § Idem quaesivit ff. de liber. cau. [de liberatione legata, Dig. 34, 3, 28, 12], and he is followed by Baldus who proves this conclusion by many authorities and replies to those contrary in l. 1, n. 44, et seq. Cod. de Confessis. [Cod. 7, 58], where it is said that a Judge should not admit this qualified confession; and by Beron. in cap. At si Clerici, n. 73, de Judic., where others being cited the more common practice is declared; Angel. de malefic. verb. Comparverunt d. d. Inquisiti, etc. n. 1; Foller. in pract. Crim. verb. Et si confitebuntur, par. 1, n. 46; Boss. tract. Crim. tit. de confess. n. 19, where it is said that Bartolus is generally approved in this; Menoch. de arbitr. cas. 93, n. 37, where [he speaks] of the common practice; Clar. in pract., § fin. qu. 55, vers. Posset quoque reus, where the contrary authorities being refuted, he says this is the more common opinion, and should not be departed from in giving judgment. Pacian. de

probat. in book 1, cap. 25, n. 13; Gutter. qu. 19, n. 33 and 34; Spad. cons. 109, n. 22, lib. 1.; Conciol. verb. confessio, resol. 24, n. 1. et seq.; Vermigliol. cons. 238, n. 6, and cons. 282, n. 1.

[1] Since for these reasons, Ex his cum: Bottini in Pamphlet 13 begins with a discussion of the question of torture, in § Redarguit D. Meus: § In fine vero and § Praemissa propterea, and then devotes the rest of his long argument to the merits of the case and Pompilia's innocence. He then returns parenthetically in this and the next section to the mooted question of the effect of a qualified confession. [2] elisa remaneat: remanere as an auxiliary. [3] qualitatem: here a circumstance in mitigation. [4] respiciendis. [5] scindi; split. [6] poenam ordinariam: the ordinary punishment of death. [7] ultra quod enim. [8] magni nominis. [9] ad hoc: seems to have this meaning.

AUTHORITIES

In this and the section following Bottini answers the arguments of Archangeli in § Confessio D. Guidonis, CI, 109, sec. 17, and Spreti in § Hujusmodi enim, CXXIX, 136, sec. 18, and § Confessio D. Guidonis, CCXXIX, 231, sec. 21. The notes to those sections have already stated many of the authorities, the main question being the authority of Bartolus on the l. Aurelius. Bottini in this section takes the position that strictly according to this classic text of Bartolus the qualification of the causa honoris annexed to Guido's confession ought to be entirely rejected; but in answer to the more modern authorities, that at all events such qualification should have the effect of mitigating the punishment, he proceeds in the sections following, § Hujusmodi honoris and § Nimis autem, to argue that this doctrine should not apply to Guido's case where he took vengeance ex intervallo.

I am not able to verify this reference to Baldus. The citation does not seem in point. Menochius de Arbitr. cas. 93, n. 37, cites Bartolus on the l. Aurelius and many authorities following Bartolus, saying that Boerius, qu. 243, n. 5, and Marsiluis, cons. 136, n. 31 and 44, are clearly in error in holding the opposite view for they inconsiderately quote many authorities who are not only not opposed to Bartolus, but clearly agree with him. Menochius adds, however, that the qualification will benefit the confessor to this extent that he should not be punished with capital punishment but more mildly at the discretion of the Judge.

Clarus, § Fin. qu. 55, vers. Posset quoque reus, follows Bartolus and refutes Marsilius saying that in practice we should not depart from the opinion of Bartolus who is without doubt approved by the common opinion. Clarus in this quaestio, vers. Forte posset, is cited by Archangeli, § Confessio, ci. 109, sec. 17. Spada, cons. 108, n. 22, quotes Clarus. Conciolus follows "the common opinion." Vermigliolus, cons. 238, n. 6; when the presumption is against the qualification the confession

should be divided. This consilium, n. 8, is cited by Spreti, § Hujusmodi, CXXIX, 136, ante sec. 18.

Notwithstanding the great authority of Bartolus, the more modern authorities sustain the opposite view.

Section 33.

[Bottini, Pam. 13, CLXXXII, 187, § Hujusmodi honoris causa.]

The causa honoris of this kind is not always available for avoiding the penalty of the extreme punishment,[1] but only in those cases when vengeance is taken without delay, or, even according to the more lenient opinion, after an interval, when the adultery is legally proved by a sentence of condemnation or by a confession.

[1] ultimi supplicii poena.

Section 34.

[Bottini, Pam. 13, CLXXXII, 187, § Nimis Autem.]

But the reins of private vengeance would be too far relaxed to the injury of the Commonwealth if, when the proof of adultery was lacking, in order that the penalty should be lessened the defendant should stand upon a qualification annexed to his confession, because in this way he might become[1] a witness in his own cause, which is permitted to no one, according to the Text in l. nullus ff. de Testib. [Dig. 22, 5, 10] and in c. Nullus eod. Tit. [Cod. 4, 20]; Rot. Jan. dec. 94, n. 1, and in Rec. decis. 261, n. 3, part. 3, and decis. 272, n. 19, part. 17; and the burden of proof incumbent on him for escaping the ordinary penalty might be discharged[2] by the mere assertion of the defendant himself, than which nothing more absurd can be thought of.

[1] sic evaderet testis: turn out to be a witness: Mr. Hodell translates: "a witness might make a way of escape in his own cause."

[2] onus impletum remaneret: see Glossary, remanere.

AUTHORITIES

The citations of the Digest and Codex and of Recent Decisiones relate only to the general rule of exclusion of an interested witness.

SECTION 35.

[BOTTINI, PAM. 14, CXCI, 196, § CUM ERGO.]

Therefore in the present case, since so many grave aggravations concur increasing the degree of the crime, on account of which my friend the Advocate of the Poor in § Agnoscit Fiscus [CXXXIV, 140, Ch. X, sec. 1] admits[1] that the penalty should be increased, and since such increase cannot be effected[2] except by capital punishment (for in other cases[3] the mere[4] homicide of a wife committed after an interval — even assuming that[5] her adultery had been proved, which in our case has not at all been proved — could according to the milder opinion demand only[6] a diminution of the penalty); [therefore I say] the justice of the decree for the torture of the Vigil has been sufficiently defended and maintained against the contrary arguments; so that the confession being added, condign punishment remains to be inflicted for the expiation of such a wicked crime.[7]

[1] admittit. [2] verificari possit: to be verified, made true, made good, to be realized. [3] nam alias. [4] solum: i.e., homicide without the aggravating circumstances. [5] quatenus. [6] unicam minorationem: or perhaps unicam agrees with sentientiam? [7] This section is repeated in Ch. X, sec. 85, and is a typical example of Bottini's involved style.

CHAPTER VI

THE ARGUMENTS AS TO THE GUILT OF POMPILIA BASED ON THE FACTS OF THE CASE

A. THE ARGUMENT IN BEHALF OF GUIDO, TO SHOW THE GUILT OF POMPILIA AS GROUND FOR THE DEFENSE OF CAUSA HONORIS

Introduction and Statement of facts.	Section
Pompilia's guilt appears from the facts:	1
1. From her elopement with Caponsacchi throughout a long journey.	6
2. From the love letters mutually exchanged.	8
3. From the jealousy displayed in the letters.	14
4. From the clandestine visits of the Canon to Pompilia.	15
5. From Pompilia's appearance at her window upon his signal.	17
6. From their treacherous preparation for the elopement.	18
7. From their kisses exchanged during the elopement.	19
8. From their sleeping together in the tavern at Castelnuovo.	21
9. From the fact that the Canon was dressed as a layman.	22
10. From Pompilia's false statement as to the hour of their arrival at Castelnuovo.	23

11. Therefore, their guilt sufficiently appears, especially as lighter proofs are enough to excuse Guido than would be necessary to punish Pompilia. Section 24

AA. Answers of Guido's counsel to certain Arguments of the Fisc.

AA. I. The answer of Archangeli to the Argument of the Fisc that Pompilia fled on account of the unhappiness of her home with Guido.

1. The deposition of Angelica is inadmissible and untrustworthy. 27

2. Guido's household was supplied with money, as appears from Pompilia's theft of it. 28

3. The real cause of the domestic troubles was the behavior of the Comparini and of Pompilia herself. 29

4. And the evil advice given by her parents to Pompilia as shown in her letters to the Abate Franceschini. 32

5. And in the letters of the Governor of Arezzo, the Bishop of Arezzo, Signor Albergotti, the Abate Franceschini, and Signor Romano. 34

AA. II. The authenticity of Pompilia's letters.

1. As to her letter to the Abate Franceschini, Pompilia's ability to write is shown by her proved signature and the testimony of Caponsacchi and other witnesses; and the impossibility that she inked over letters made in pencil by her husband. 40

Section

2. The letters found at Castelnuovo were offered in evidence by the Fisc in the Prosecution for Elopement. 42

AA. III. Reply to the Argument of the Fisc that Pompilia's letters were sent to Caponsacchi for a good purpose. 43

AA. IV. Reply to the Argument based upon Canon Conti's complicity in the affair. 45

AA. V. Reply to the Argument that some presumptions of Pompilia's guilt were proved only by a single witness. 47

AA. VI. Reply to the Argument of the Fisc based upon Pompilia's dying declarations of her innocence.

1. The testimony of the witnesses is imcompetent:

a. Because they were mere extra-judicial affidavits. 49

b. Because they were obtained by force and entreaty pendente lite. 51

c. Because the deponents were interested under Pompilia's will. 52

2. Pompilia's declarations, even if proved, are insufficent:

a. Because no one would reveal his own disgrace. 53

b. Because the question concerns the prejudice of another person. 54

c. Because her declarations cannot overcome the plain proofs of her evil life, and "one who lives badly, dies badly." 55

d. Because her declarations could only help Caponsacchi, if she had previously inculpated him, but not herself. Section 56

e. Because her testamentary provision for her child cannot be commended. 57

Section 1.

[Arch., Pam. 1, ix, 11, § Nupserat sinistris.]

The Count Guido, descended from the noble family of Franceschini,[1] had married under unlucky auspices Francesca Pompilia, whom Pietro and Violante, as husband and wife, had represented, even to one occupying a station of eminent dignity,[2] to be their own daughter. After a short time she was taken to Arezzo, her husband's country, together with her pseudo-parents,[3] and was restrained from leading too free a life (although she has falsely stated that she was hated on the pretext of her barrenness) as appears clearly from her deposition in the Prosecution for Elopement.[4] As both she herself and her parents took it ill[5] that their accustomed freedom of life was denied to them, they instigated[6] the girl to make complaint before the Very Reverend Bishop that she had been given poison to drink by her brother-in-law;[7] and at the departure of this couple, when they were going to return to the City [Rome] they suggested[8] by their most detestable advice — yes, even commanded her by her duty of obedience — that she should kill her own husband, poison her brother-in-law and mother-in-law, and burn the house down; and thereupon (but after their own departure that they might not seem to have given her this wicked advice) with the aid of a lover whom she should choose, she should carry into

effect her premeditated flight to the City, as clearly appears from one of her letters in the said prosecution.[9]

[1] Dominus Guido Franceschini nobili genere ortus. Mr. Hodell translates: "Guido Franceschini born of a noble race." Franceschini is genitive. [2] Mr. Hodell translates: "even to one occupying a high office." The words are "in eminenti Dignitate constituto," i.e., His Eminence Card. Lauria who drew the marriage contract; Trial and Death, E. 270, by whom it was probably witnessed, § Nam praeterquamquod, CIV, 112, sec. 41, post. I think this Card. Lauria was Laurentius Brancatus, "Card. Lauraea nuncupatus." [3] cum eius Pseudo Genitoribus, Mr. Hodell translates: "foster parents;" but Archangeli's purpose is to emphasize the trickery of the Comparini. [4] in Processu fugae. Processus, legal proceedings or prosecution. Process in English law signifies the means of compelling the defendant to appear in Court. I have translated it in the O. Y. B. as proceeding, prosecution, trial or record, for lack of a more comprehensive term. Fuga, flight or "running away," I have generally translated "elopement" as the nearest English equivalent. The "Prosecution for Elopement" was the legal proceeding taken at the instance of Guido against Pompilia and Caponsacchi after they were arrested at Castelnuovo. Many forms of Processus are contained in Martinus, Praxis Criminalis. [5] aegreferentibus. [6] instillarunt, instilled into her. [7] This does not seem to be referred to anywhere else in the arguments or in that part of the evidence which is preserved for us. [8] insussurarunt, whispered in her ear. [9] The letter of Pompilia to the Abate Paolo, IV, E. 56; the Italian word is Socere, which Archangeli renders as "socrum."

Section 2.

[Arch., Pam. 1, IX, 11, § Domum reversi.]

When these pseudo-parents had returned home they declared that Francesca was not their child, but the daughter of a washerwoman[1] of the lowest class by an unknown father, and they brought suit before Thomatus as Auditor Camerae[2] to have the dowry contract[3] annulled.

[1] lotrix, Mr. Hodell translates, "strumpet." The word is in Cambridge Dict. Browning says of Pompilia's mother in R. and B., IV, 166:

"One of those women that abound in Rome,
Whose needs oblige them to eke out one poor trade
By another vile one."

In the O. Y. B. she is generally styled "inhonesta." Lotrix is used in § Aut in veritate, XIX, 20, Ch. IX, sec. 3. [2] coram A. C. Thomato. [3] constitutionis.

Section 3.

[Arch., Pam. 1, IX, 11, § Decrescente in dies.]

As the affection[1] of Francesca for her husband was decreasing from day to day, and her love[2] for a certain Ecclesiastic[3] was increasing, things went so far that on an appointed night, when her husband was overcome with sleep; — Would that it did not happen through her design and with a drug procured from the outside! — she undertook her elopement[4] from her husband's home, stealing his money also and going to Rome in the company of her said lover. Her most afflicted husband pursued them closely, and she was imprisoned not far from the City; and a prosecution[5] having been thereupon instituted, the lover was banished[6] to Civita Vecchia for adultery, and she herself was put away in a place of safe keeping.[7] But when her pregnancy became urgent,[8] she returned to the home of Pietro and Violante and gave birth to her child — Would that it had not been conceived in adultery! This increased the shame and resentment of her husband, and his anger which had for a long time been aroused increased to such an extent that, having thus lost his honor among upright men, he was pointed at everywhere with the finger of derision,[9] especially in his own country[10] where a good reputation is exceedingly cherished[11] by men of good family. For this reason his anger impelled the unfortunate man to such fury, and

his resentment drove him to such desperation, that he thought it preferable to die rather than to live in shame among honorable men. With blinded intellect he took his hurried way to the City, surrounded with four companions, and on the night of the second day of the current month of January,[12] under pretext of giving her a letter from her banished lover, he is alleged[13] to have hastened[14] to their house, the door of which was opened at the name of the banished lover, and to have cut the throats of Violante and Pietro, and to have stabbed Francesca with so many wounds that she died a few days afterwards.

[1] decrescente charitate. [2] augente amore. In Mr. Hodell's translation "love" and "affection" are transposed. [3] Ecclesiasticum. Throughout Mr. Hodell translates "priest." Caponsacchi was not a priest and did not claim to be. He was a Canon and only a sub-deacon. See his deposition, XC, 97. This distinction is important. [4] fugam. [5] constructo Processu. See this Processus Fugae explained, Ch. IV. [6] relegatus. See as to the distinctions between Relegatio and Deportatio, Ch. III. I have translated "banished," but technically banishment included the aquae et ignis interdictio. [7] in conservatorio; like our word asylum, or "home" in its technical sense of an institutional home; equivalent in use to monastery or convent. Mod. Ital.: poor house, girls' school. [8] urgente utero praegnante. [9] in ludibrium digito ostenderetur. [10] See Dynus's account of the case on this point in Ch. XIII. [11] Summopere cordi est. [12] labentis mensis Januarii. This shows that the trial began in the same month of January. [13] praetenditur. Throughout Mr. Hodell translates "pretend," etc. [14] properasse.

Section 4.

[Arch., Pam. 1, x, 12, § Eadem desperatione.]

While he continued in this desperate condition, his dulled and improvident mind suggested no way to secure his safety; but attended by the same men he set out to return to his own country along the consular road[1] by the direct way,[2] and

while resting on a mattress in a certain tavern he was kept imprisoned[3] there together with his companions by the pursuing police.[4]

[1] per viam consularem: consular or public road, here the Via Flaminiana. [2] recto tramite: trames, a path; used in the O. Y. B. and elsewhere as meaning road or way in general or in the sense of journey as in § Et praemisso, x, 12, sec. 6. § Accedit quod, cx, 119, sec. 14. According to Sir Frederick Treves's account in his invaluable work, The Country of The Ring and the Book, p. 150 (map facing p. 104), Guido and his band left Rome through the Piazza del Popolo by the Flaminian way; then to Ponte Milvio, where the Via Cassia, a less frequented road, branches to the left, and thereby to Merluzza, nearly fifteen miles from Rome, where they were arrested. As to the Via Flaminiana and the Via Cassia see Forcellini and Facciolati Lexicon. [3] carceratus remansit, see remanere in Glossary. [4] Birruariis. Ital. Birro, sbirro, a policeman or constable. DuCange and D'Arnis give Berroerii from the Ital. as meaning sometimes Apparitores — and brigands.

Section 5.

[Spreti, Pam. 2, xxv, 27, § Ex processu.]

From the Prosecution for Elopement,[1] which was framed in this very tribunal by my Lord Venturini himself,[2] judge in the present case, it sufficiently and more than sufficiently appears that Francesca Pompilia, the wife of Guido Franceschini, a nobleman of Arezzo, committed adultery with the Canon Caponsacchi, with whom the parents of the said Francesca Pompilia had conspired, although they were living here in the City. After Francesca had first given a sleeping draught to the said Count Guido and his entire family, she fled that same night from the city of Arezzo, toward the City of Rome, with the result that the Canon, as it has been related,[3] was banished[4] for this cause to Civita Vecchia with the statement, made in the decree of his said condemnation, of his criminal

knowledge of the said woman. The said adultery is also manifest from other matters of fact[5] to be elaborated by my colleague, the Procurator of the Poor,[6] so that there remains no room for doubt concerning it — nay, rather their aforesaid adultery can be said to be notorious[7] here in the City, in the country of the said Count Guido, and throughout all Etruria.

[1] ex processu fugae. [2] See as to Venturini, Ch. II. [3] memoratus, perhaps "as will be remembered," i.e., from the record. [4] relegatus. [5] ex aliis in facto, or "from other matters in the case." Cf. the expression facti species. [6] It was the particular business of the Procurator to bring out the facts of the case, though the distinction was not rigidly adhered to. So Bottini, though Advocate of the Fisc, took this burden on himself. [7] notorium: not merely notorious in its English meaning; but known as a matter of public record, from the decree of the Court.

Section 6.

[Arch., Pam. 1, x, 12, § Et praemisso.]

And I say in the beginning[1] that there can be no doubt about the adultery of the wife, not merely[2] from her elopement together with her lover continued throughout a long journey; Rimin. Jun. cons. 274, n. 31; Menoch. cons. 31, n. 22; Farinac. qu. 136, n. 184; Crus. de Indic. part 2, cap. 7, n. 27.

[1] praemisso non posse dubitari. A peculiar use of the ablative absolute not infrequent in the O. Y. B.; praemisso used with quod in § Honoris causa, xli, 41, Ch. XI, sec. 2. [2] nedum: "not to speak of;" used here as correlative with sed etiam, § Sed etiam, xi, 13, Ch. VII, sec. 1; i.e., the adultery appears not only from the facts of the case as enumerated in this and the following sections, but also from the prior decree of the Court, thus indicating the two divisions of the argument on the subject of proof.

Authorities

See under next section.

Section 7.

[Arch., Pam. 8, cx, 119, § Accedit quod; vers. Non puto.]

I do not think it can be doubted that their going away together[1] from her husband's home, and their association throughout a long journey,[2] prove their adultery. Farinac. dicta qu. 136, n. 182; and there is the text on this point in leg. consensu, § Vir quoque, Cod. de repudiis: "or if she against her husband's will remains an entire night away from home without a just and probable reason." [Cod. 5, 17, 8, 3.]

[1] discessus simultaneus. [2] per longam tramitem.

Authorities

Farinacius, qu. 136, from Book 5 de delictis carnis, where he details thirty-two presumptions of adultery, of which the twenty-third is grounded upon the text in the Codex; and the twenty-fourth is stated to arise against a wife who without her husband's permission leaves his home and remains away. Farinacius refers to the same citations from Menochius and Riminaldus. In Riminaldus cons. 274, n. 31, the wife did not go on a long journey but merely "went out" with the suspected person against her husband's will. Crusius, P. 2, ch. 7, n. 27, cites the text from the Codex which he says applies where a wife without her husband's consent leaves his home and stays away without probable cause. This passage from the Codex, "aut ipso invito sine justa et probabili causa foris scilicet pernoctantem," is contained in a rescript of the Emperors Theodosius and Valentinianus, A.D. 449. While clear in meaning, it presents a difficulty in the construction of the word "scilicet." Pernoctare is classical Latin and means, of course, to remain or pass the whole night, or to lodge all night; foris, abroad or away from home. What is the precise meaning of scilicet? The Gloss is silent. I am indebted to a learned friend for his criticism. It might mean "unless, of course, she should have some just and probable reason," etc., but in that case scilicet should follow causa, whereas it evidently qualifies foris. It is ingeniously surmised that in the original text the words "foris scilicet" were absent and were added as a MS. gloss to explain pernoctantem; assuming that sometimes pernoctare implied "staying out nights." There appears no trace of this meaning in Calvinus or Brissonius, and Polydorus Ripa de Nocturno Tempore, cap. 167, n. 29, says: "Pernoctare non est foris vigilare, sed simpliciter vigilare et totam noctum insomnem ducere. Qui autem voluerunt aliquem foris vigilasse, non dixerunt simpliciter

pernoctasse; sed foris," etc. (citing Terence and Cicero). It is probable that the words were merely used in a somewhat unusual order. Possibly scilicet has here a colloquial meaning equivalent to "you know" or "understand," but this seems hardly probable in an Imperial rescript. The Gloss on foris is "unless she has been at her parents' home, or with other persons who are above suspicion, or unless her husband has driven her out of his own home."

See Bottini's answer to this argument, § Ne applicantur, CLXXVIII, 184, post sec. 90.

Section 8.

[Arch., Pam. 1, xi, 13, § Ex litteris amatoriis.]

[Their adultery also appears] from the letters mutually exchanged by Pompilia and Caponsacchi, which cannot be read in the Prosecution for Elopement without nausea. Hostien. in cap. Praeterea, n. 5, vers. De Adminiculis [Decretals, Book 2, 20, 27]; and on this point Jo. Andr. n. 4; Ancharan. n. 3, de Testibus [Decretals Book 2, 20, 29]; Paris. cons. 54, n. 64, lib. 4; Rimin. Jun. dicto cons. 274, n. 9; Farinac. dict. qu. 136, n. 126; Crus. de Indic. dicta part. 2, cap. 7, n. 7.

[Arch., Pam. 8, cix, 118, § His praehabitis, vers. Et ex litteris.]

And from the letters containing such very tender expressions.[1] Ancharan. in cap. Praeterea, n. 3; and on this text, Felin. n. 3, de Testibus; Paris. cons. 54, n. 64, lib. 4; Riminald. Jun. cons. 274, n. 9, lib. 3; Mascard. de probat. conclus. 64, n. 10 at the end.

[1] expressiones.

Authorities

Love letters constitute the eighth presumption of adultery according to Farinacius, who collects the authorities, as does Mascardus. I have not Ancharan. de Testibus, comment in cap. Praeterea, but Ancharanus, Familiares Questiones, book 3, qu. 75, n. 6, also supports the text. Hipp. Riminaldus, cons. 274, n. 9, mentions as a proof "missio nunciorum."

Crusius de Indiciis, P. 2, ch. 7, n. 7, is quite full on this point and illustrates it with the story of the Emperor Ludovicus, whose wife, when he was at the front, dispatched two letters, sealed respectively with red and black seals, one for the Emperor, the other for one of his lieutenants. The clumsy messenger unfortunately mixed them up. Ludovicus returned in haste and took speedy vengeance on his wife, and also on her ladies-in-waiting as accessories. Frightened by a dream which turned him grey in a night, he founded the monastery of Fuerstenfeld to expiate his rash severity; anno 1256.

Parisius, cons. 54, n. 64, book 4, love letters found in the woman's possession indicate adultery. Mascardus, vol. I, conclu. 64, n. 10, "and so if love letters are found in the possession of the woman." See § His praehabitis, CIX, 118, sec. 46, post. Christophorus Crusius of Hanover, author of the treatise De Tortura et Indiciis, was one of the great authorities on the subject (published in 1668). It contains much curious and interesting information.

SECTION 9.

[ARCH., PAM. 8, CVI, 114, § EX EIUS ENIM.]

For, from her own deposition, it appears that she had often been scolded on account of her barrenness[1] and had been greatly frightened by threats of death by reason of her amours with the said Ecclesiastic,[2] as is stated in our said Summary, Number 2, Letter A.[3] Nor was the wary husband deceived, since her love [for the Canon] was growing day by day — yes, indeed, while her conjugal affection lessened toward her husband, her affection was increasing toward her lover. For in the said letters which are given in the Summary, Number 7,[4] that Ecclesiastic was called "**Beloved, Adored One, Mirtillus, My Soul, Most beloved, Narcissus, My longed for Blessing, Dearest Idol,**" and she signed herself "**Your faithful sweetheart, Amarillys,**"[5] and on the other hand she was called by her lover "**My adored Signora.**" And in every one of the letters[6] is expressed the intense love and the ardor of the love with which the unhappy girl was tormented for her lover as you may see. I

should be ashamed to refer to all of the most tender expressions[7] of her love, but one or two only I shall not omit, that "the lion might be recognized by his claw;"[8] as in Letter 17 where we read "so that you cannot say that I no longer love you, because all my good wishes for Signor Guido are turning toward you, who deserve it."[9] And this perhaps is the reason why she refused to sleep with her husband as the said letter of Signor Albergotti indicates, where he says, "the Signora has been melancholy and two evenings after your departure she made a big disturbance because she did not wish to go and sleep with Signor Guido her husband, which displeases me very much"[11] — page 190.

[1] ob eius sterilitatem. [2] cum dicto Ecclesiastico — not priest. [3] Pompilia's deposition, LXXXIV, 92. [4] XCII, 99. [5] amarilli in the text. [6] in singulis; Mr. Hodell translates: "in the details." [7] expressiones. [8] ab ungue leo dignoscatur. [9] Letter Number 17, XCVII, 105. [10] This letter in part, LIV, 55. And see § Verificatur, CV, 113, post sec. 36.

Section 10.

[Arch., Pam. 8, CVI, 114, § In prima epistola.]

In the first letter [we read], "My affection no longer has any rein."[1] In the fourth, "I am ready to do what I have told you."[2] In the tenth, "I will suffer quietly the pains which are pleasing to you."[3] And it would be a long matter and produce too great nausea to recount them one by one; for she took it hard to conform herself to the virtuous customs of Arezzo, accustomed as she was to leading a freer life, as may be read in the letters of the Abate Franceschini, produced on the other side, record page 179 reverse,[4] where we read: "These occasions of bitterness which have arisen between yourselves and Signor Guido I do not

wish to examine. I know enough to say that this has arisen from your wishing to turn his wife from what, according to the custom of the country, her husband both may and ought to do. Because over the wife God has given him authority and likewise it is the general usage and custom of the country. If you and Signor Pietro should stand in the way of this, you would do wrong, and it would be the duty of the husband to admonish his wife." And in another letter, page 124: "I cannot persuade myself that my mother and brothers would conduct themselves in such a way as to force her to have such recourse." And after a few words: "And know well that what I have endeavored by my words to urge upon Signora Francesca, Signor Pietro, and yourself is only out of pure zeal for the honor of your house and of yourselves."

[1] XCII, 99. [2] XCIII, 100. [3] XCV, 103. [4] fol. 179, tergo, i.e., the reverse side of fol. 179; Mr. Hodell translates: "page 179, and following." These letters of the Abate Paolo are not included in the Summaries and were evidently written to Violante.

Section 11.

[Arch., Pam. 8, cvii, 115, § Vice versa in litteris.]

Reciprocally[1] the same thing is shown in the letters of the said Ecclesiastic,[2] as in Letter Number 20, where we read: "I have received your notes, full of those expressions, etc. Be pleased to receive me into your bosom in which I rest all my affections."[3] And the letters that relate to the elopement render a clearer proof of their mutual interchange [of affection][4] inasmuch as it is verified by the result that followed.[5] Thus in Letter 18, where we read: "I wish to know whether you can leave Sunday evening, that is tomorrow evening; for if you do not go away tomorrow

evening God knows when you will go, because of the scarcity of carriages." And after a few intervening words: "As soon as you see that they are sound asleep, open the door for me, so that I may help you make up your bundles and collect the money;" and after a few more words: "Praying God that he will make this design of ours turn out well."[6]

[1] vice versa. [2] ecclesiastic, not priest. [3] XCVIII, 106. [4] mutuae vicissitudinis. [5] verificata ab effectu sequuto. [6] XCVIII, 105. Their pious prayer was not favorably received. Caponsacchi in his deposition refers to two letters purporting to be written by him to Pompilia; one beginning "Adorata mia Signora, vorrei sapere," and ending "mi hà detto il Conti." Letter 18, XCVIII, 105, begins thus, but as the ending is not the same, the identity is questionable. The words "mi hà detto il Conti" occur in Letter 19, but in the middle, not at the end of it. The other letter, he says, begins "Amatissima mia Signora, Ricevo," etc., and ends, "questa mia," which is undoubtedly No. 20, XCVIII, 106. He denies having written No. 20, and says it has no resemblance to his handwriting. Unfortunately for him, it gives the details of his plot with Pompilia for their elopement together, and the facts stated fit in very well with Pompilia's admissions in her deposition, LXXXV, 93.

Section 12.

[Arch., Pam. 8, CVII, 115, § Et epistola 19.]

And Letter 19 of her said lover, in which are given certain warnings to his sweetheart,[1] also shows us clearly of what nature were their amours. "That the Jealous one seems pacified, and that he has said you were at the window is a very bad sign, because he will wish to find out in that way what you do at the window and for what purpose you are there. For [Conti] has told me that now he is more jealous than at first, and that if he finds out anything he will wish to avenge himself by putting you to death and will wish to find means to do the same to me."[2]

[1] qua dantur amatae documenta: warnings or instructions; Mr. Hodell translates: "in which proofs of love are given." [2] XCVIII, 105. Unless this is the letter referred to as No. 20 in the preceding section, Caponsacchi does not seem to have been interrogated as to it, or explicitly to have denied having written it.

SECTION 13.

[ARCH., PAM. 8, CVII, 116, § COMPROBATUR ULTERIUS.]

It was still further proved that this wretched defendant [Guido] complained bitterly[1] that she was not content with a single lover only at Arezzo, but that she has been polluted by many suitors, so that she multiplied the disgraces[2] of his house (record page 98 reverse);[3] while we read clearly in the seventh letter: "I met Signor Doctor as usual. He asked me where I was going, and along the street he asked me why I had written scornfully to him. I told him that he deserved even worse because he had given evil deeds and good words; for he had said he was fond of me, and that he wished him and the rest of them at Sovara;"[4] and in the thirteenth: "As to the Doctor you offend me by saying that I will love him again; I tell you as sure as the sun shall rise, I have not the heart for another such blow."[5]

[1] deplorabiliter exclamat. [2] vituperia. [3] fol. 98 tergo. Guido's examination does not appear in the O. Y. B. [4] XCIV, 101. I am not able to explain the reference to Sovara. [5] XCVII, 104.

SECTION 14.

[ARCH., PAM. 8, CX, 119, § ACCEDIT QUOD.]

We add, that this most wretched woman was affected with jealousy[1] of the said Canon as appears in Letters 5,[2] and 21,[3] which is not generally conceived except by lovers, wherefore since it is

undeniable[4] that carnal love was reciprocal between them, I do not think it can be doubted that their going away together from her husband's home and their association throughout a long journey[5] prove their adultery, Farinac. in said qu. 136, n. 182; and there is the Text in leg. consensu, § Vir quoque, Cod. de repudiis, "or if she against her husband's will remains an entire night away from home without a just and probable reason." [Cod. 5, 17, 8, 3.]

[1] zelothypia: jealousy, not "burning ardour," as Mr. Hodell translates. Of course, burning ardour is "usually conceived by lovers only," but the point is that jealousy is a test of love. Letters 5 and 21 are from Pompilia to Caponsacchi and allude to his "sweetheart" (amata) and "some beloved lady;" and the argument is the obvious one that Pompilia really loved Caponsacchi or she would not be jealous of him. See Bottini's reply CLXXVII, 184, § Zelotipia, post sec. 81. Matthaeu et Sanz is not referred to, but his contr. 23, De rivalitate et zelotypia, might well have been cited. He there discusses elaborately the effects of jealousy on the whole animal kingdom, with many curious illustrations, and in n. 17 shows how "Jealousy is the daughter of love;" and in short, as is said in n. 19, "qui non zelat, non amat." Zelotypia is often discussed by the writers of the day, e.g., Dynus, dec. 29. [2] XCIII, 100. [3] XCVIII, 106. [4] innegabilis. [5] per longam tramitem. Cf. § Eadem desperatione, X, 12, ante sec. 4. The last part of this section is repeated under another head, ante sec. 7.

Section 15.

[Arch., Pam. 1, XI, 13, § Ex ingressu.]

[The adultery appears] from the clandestine entry of the said lover into her home at a suspicious time; pp. 107 et seq. in the Prosecution for Elopement; Grat. cons. 50, ante n. 1 and n. 4, lib. 2; Crot. cons. 413, n. 35, vers. Idem [item] deponit; Jo. Bapt. Ferrett. cons. 168, n. 1 et seq. and n. 4; Bursatt. cons. 69, n. 9; Rot. divers. decis. 95, n. 7, part 2.

AUTHORITIES

Gratus, cons. 50, ante n. 1 and n. 4; where there was a nocturnal visit absque caligis with colloquium, etc., but also very direct testimony and a confession by the wife. Bursattus, cons. 69, n. 9, cited also in the next section, sustains the text. Rotae divers. decis. 95, n. 7; visits at midnight held to afford a presumption in a case where the wife, who appears to have been living apart, intended to enter religion. Crottus, cons. 413, n. 35: Item deponit vidisse juvenem exire domum (sic) dictae Bonafantae hora tertiarum * * * (this should mean the hour of terce, one of the canonical hours of prayer, here, from the context, nine o'clock at night).

SECTION 16.

[ARCH., PAM. 8, CIX, 118, § INGRESSUS ET EGRESSUS.]

That the said Ecclesiastic[1] entered into and went out of the home of Francesca at a suspicious time is testified to by a witness for the Fisc;[2] Record page 107 (reverse): "At the sound of the Ave Maria, while I was at the same window, I saw the door of the said Signori Franceschini open very softly, and from it passed the said Signor, etc. He pulled the door to as he went out, but did not in fact close it, and therefrom, after a little while, I saw the said Signora Francesca Pompilia, with a light in her hand, who closed the said door." This is clearly proved by Letter 11, where we read, "For that reason I do not have you come here, because now the street door is no longer opened, but you might be able to open the back door," etc.[3] This [going in and out] is of itself[4] sufficient to prove adultery even when[5] the question concerns the infliction of a penalty. Polidor. Rip. de noctur. tempor., cap. 36, n. 14; Farinac. qu. 136, n. 122.

[1] ecclesiastic, not priest. [2] i.e., in the Prosecution for Elopement where the object of the Fisc was to prove the adultery. [3] XCVI, 103. [4] de per se. [5] quoties etiam.

AUTHORITIES

Bursattus, cons. 69, n. 9, relates to a case in point, and Farinacius puts this as his fifth presumption of adultery. The last reference to

Farinacius, qu. 136, n. 122, is to his opinion, contrary to that expressed by Menochius de Presumpt. book 5, presump. 41, n. 22, who held that the presumption was only sufficient to warrant the infliction of torture, and not for conviction. Farinacius follows the distinction of Polydorus Ripa here cited, who says that entry or exit is a sufficient indicium for torture, and, although not strong enough to warrant the infliction of death, is sufficient for the imposition of an extraordinary (i.e., milder) penalty.

Section 17.

[Arch., Pam. 8, cx, 118, § Prò jęctio eiusdem.]

Her leaning out of the window at a hiss in the daytime and at night, and their nodding to one another, of which said witness testifies, Record page 108, are strongly effectual to prove carnal intercourse. Ancharan. in. cap. Praeterea, n. 3, and Butr. thereon, n. 9, at the end; Felin. after n. 13 de Testibus.

Section 18.

[Arch., Pam. 8, cx, 118, § Modus quoad fugam.]

[Then there is] the manner in which they prepared for the elopement, which includes,[1] as I may say, a kind of treachery as is shown from the letter of the Canon,[2] Number 18, where we read: "Above all, try to put some into all their cups, but do not yourself drink it."[3] And he in seeking an opportunity of mixing sleeping draughts, was inquiring what colored wine they were drinking at home, lest, as I suppose, the color of it when altered by the drug mixed with it might betray their plots, as we read in Letter Number 4: "Then further if they continue to drink the red wine I will tell you so."[4] In Number 12: "When you tell me that it is not possible to make my mother sleep while she is ill and drinks no wine;"[5] and in Letter Number 13: "As to what you wish to know about the wine I will tell you that it is red now, but I do not know how

much longer it will be so; but I will let you know about it."[6]

[1] Modus quoad fugam se praepararunt continens speciem insidiarum; Mr. Hodell translates "a show of treachery." [2] ecclesiastici. [3] letter of Caponsacchi, XCVIII, 105. [4] letter of Pompilia, XCII, 100. [5] letter of Pompilia, XCVII, 104. [6] letter of Pompilia, XCVII, 104. The use of red and white wine was evidently alternate.

Section 19.

[Arch., Pam. 1, xi, 13, § Ex osculis.]

[The adultery also appears] from the kisses snatched[1] during their elopement, record page 100, according to the verse: —

"Visus et alloquium, tactus, post oscula, factum,"[2]

as is shown by Abb. in cap. Tertio loco, n. 4, vers. Vel ipsam osculantem, Extra de praesumpt. [Decretal 2, Tit. 23, cap. 13]; Hostien. in dicto cap. Praeterea, n. 5, vers. de Adminiculis etiam, Extra de Testibus [Decretal 2, Tit. 20, cap. 27]; and on that text Jo. Andr. n. 4; Ancharan. n. 3; Ant. de Butr. n. 9, at the end vers. Adminicula autem.

[1] ex osculis impictis: perhaps imprinted. See Glossary. [2] Sight, conversation, and touch, then kisses, then follows the deed. This hexameter is a favorite quotation of the older writers. Its origin is obscure. The Gloss on Dig. 48, 5, 23, 1, refers to Cicero's Topica, but I cannot find it there. Another form is given in Burton's Anatomy, Part 3, Sec. 2, Mem. 2, Sub-sec. 2, princ.: "Visus, Colloquium, Convictus, Oscula, Tactus," the five degrees of love. Cf. the "quinta linea amoris" in § Idque est, LXXVII, 84, Ch. VIII, sec. 80. The curious may read elaborate comments on the five degrees of love in Henricus Kornmannus, Sibylla Trig-Andriana. Cologne, 1765.

Section 20.

[Arch., Pam. 8, cx, 119, § In progressu itineris.]

In the progress of their journey, kisses were snatched in turn,[1] as to which a witness for the

Fisc[2] testifies, — and I do not find in the record of the prosecution that he saw them by night, as is assumed by the other side,[3] but on page 100 he asserts: "I only saw that at times they kissed each other;" — and these kisses Francesca was so anxiously longing to snatch and likewise to receive, that in Letter Number 11 [she said]: "I thank you for the kisses you send me, but if yourself could give them to me, I would hold them dear. I give you as many million more."[4] And in Letter Number 10: "And giving you an amorous kiss."[5] And in Number 5: "I say good bye with a million kisses."[6] And here and there in the other letters [such expressions] make the adultery not at all doubtful, so much so that there are not lacking [authorities] who assert that when the kiss is proved, adultery may be said to be proved. Clar., § Adulterium, n. 16; Laurent. Tennin. in pract. cauthel. 6, n. 153.

[1] ad invicem impicta, perhaps "imprinted." See Glossary. [2] The Fisc in the former prosecution of Pompilia and Caponsacchi, of course endeavored to prove adultery. [3] In the present trial the Fisc urged that the testimony of this witness should be disregarded because the kissing must have occurred at night. See § Eodemque defectu, LXXV, 82, post sec. 91; § Mutua deosculatio, CLXXVIII, 185, post sec. 92. [4] XCVI, 103. [5] XCVI, 103. [6] This reference seems an error. Probably Letter 9, XCV, 102, is intended.

AUTHORITIES

Clarus says that a married woman loses her dower by giving a kiss to a man other than her husband, and that she is thereby proved to have committed adultery, not merely with regard to its civil consequences, but also in criminal proceedings, citing Gomezius ad leges Tauri, leg. 80, n. 50, adding, however, that he does not agree with the opinion of Gomezius that the adultery thus proved should be punished with the ordinary penalty, i.e., death. Farinacius, qu. 136, n. 129 (not cited here), enumerates kissing as the tenth presumption of adultery, quoting the verse above given (as to which Parisius cons. 160, n. 6, says "passive et active"); Nevizzanus in his Sylva Nuptialis, Book 4, n. 78, mentions the boast of John Barberius that "we Frenchmen who have faith in the honor of our women always think it done in good part (arbitramur in bonam partem) and that all such things

happen for the sake of good and honorable friendship." It will be remembered that Katharine says in King Henry V, Act 5, Sc. 2, that it is not the fashion for the maids in France to kiss *before* they are married. Buckle in his Common Place Book, art. 577 and 2090, and Art. 500, of Manners in the 17th Century, gives some references to the custom of kissing in England in the 16th and 17th centuries. In Italy, kissing a woman against her will appears from Raynaldus, Observ. cap. 11, § 6, to have been a serious business, punishable, according to circumstances, with a fine, banishment, the galleys or even death. He relates the story from Valerius Maximus of Pisistratus, the tyrant of Athens, whose daughter was kissed by a young man in the public street. Pisistratus, when asked in inflict the death penalty on the youth answered, "If we kill those who love us, what shall we do to those whom we hate?" Ad quod non fuit responsum. See Crusius de Indiciis, Part 2, ch. xi, n. 13, for some verses on this. See also Muta Dec. Siciliae, 62, cited ante in Ch. IV, where kissing a girl in the street against her will was punished in 1617 with a sentence to the galleys for three years. Martinus, Praxis Criminalis, 247, gives the modus procedendi in such a case.

Joannes Nevizanus (Nevizzanus or Nevisanus) was born at Asti in Piedmont, was professor at Turin and Padua, and died in 1540. The topic of his celebrated book is An Nubendum sit, vel non. Dr. David Murray, in his Lawyers' Merriments, gives some account of him, including the story that he was mobbed by the ladies of Piedmont for his ungallant remarks concerning the fair sex. The Sylva Nuptialis was placed on the Index and was a favorite of Burton, the Anatomist of Melancholy, who cites it frequently; Dr. Murray thinks it may have been the prototype of the Anatomy. I think Rabelais must have been indebted to Nevizanus for Pantagruel's advice to Panurge as to marriage in Book III, ch. 9. Bayle, on the authority of Francis de Billon, states that Nevizanus made his *amende honorable* to the ladies in the distich:

> "Rusticus est vere, qui turpia dicit de muliere,
> Nam scimus vere quod omnes sumus de muliere."

The book, though often reprinted, is now rather scarce.

Section 21.

[Arch., Pam. 1, xi, 13, § Ex condormitione.]

[The adultery appears] from their sleeping together in the same room at the inn, Record, page 49. Paris. cons. 160, n. 60 [n. 6], lib. 4, vers. Et ulterius; especially Joseph. Fontanella cons. crim. divers. 97, n. 29, lib. 2, in parvis; Soccin. Jun. cons. 32, n. 16, lib. 2; Jo. Baptista Ferrett. in said

cons. 168, n. 1, at the end, and n. 11; Menoch. de praesumpt. [lib. 5], Praesumpt. 41, n. 11.

AUTHORITIES

Parisius, book 4, cons. 160, n. 6: "et ulterius qui sola cum solis (sic) conversetur in cubiculo." Menochius says that while this is not strict proof, "vere et proprie," yet all the authorities show that it affords an "urgent presumption" of guilt, to be punished by "extraordinary punishment," that is, not by death. The case in Socinus, Jr. was a civil action by the injured wife against her husband de separatione thori and restitution of dower. Socinus goes into the matter very fully.

SECTION 22.

[ARCH., PAM. 8, CXI, 119, § SED PROFECTO.]

But certainly all obscurities are entirely removed since — passing over the fact that the Canon was dressed in lay clothing (pages 4,100)[1] which gives no little weight to the proof of adultery, Matthaeu de re crim. contro. 11, n. 31 — they arrived together at the inn of Castelnuovo about half past seven in the evening[2] as three witnesses for the Fisc agree in their testimony (pages 44 reverse, 47, 49). And although there were two beds in the chamber[3] only one nevertheless did the said Canon[4] direct to be made ready, and throughout the whole night, with the doors closed, did he rest solus cum sola (if lovers can rest); from which the adultery has been proved[5] beyond doubt. Cap. Litteris de praesumptionibus [Decretal 2, Tit. 23, cap. 12]; Menoch. consil. 31, n. 25, vers. Nec vera est; Hector. Aemil. de Testib. verb. Testis Adulterium, n. 33; Farinac. in said qu. 136, n. 170, and in other authorities passim, besides those cited in our other argument.

[1] use of lay garb; replied to by Bottini in § Usus quoque vestium, CLXXIX, 186, post sec. 98. [2] sub hora prima noctis cum dimidio. [3] mansione, the house or inn. Here probably chamber or room, although cella or cubiculum would be usual. Mansio in § Omissa

ulteriori, CCXXVII, 229, Ch. VIII, sec. 34. [4] ecclesiasticus. [5] probatum remanet adulterium. Remanere used as an auxiliary.

AUTHORITIES

This condormitio is the twenty-first presumption of Farinacius. Menochius gives it as the fourth in his list, "quando solus cum sola in loco secreto et abdito inventus est;" and collects the authorities at large, discussing also the opinion of Rosellus and Cravetta that these circumstances do not amount to actual proof, while they admit that the presumption arises. Decretal, cap. Litteris, "Per violentam praesumptionem probatur carnis copula." As to lay garb, Matthaeu de re criminali, cont. 11, is the case of Joannes Vecino in Appendix 3.

Jacobus Menochius (b. 1532, d. 1607) was a professor at Padua, a Senator, and a text writer of very high reputation. His three important works, De Praesumptionibus, De Arbitrariis (Judicial Discretion), and his Consilia, are cited about thirty times in the O. Y. B.

SECTION 23.

[ARCH., PAM. 8, CXI, 120, § QUALIS QUIPPE.]

Proof of this kind becomes[1] the more effectual from the lie of Francesca when she asserts that they arrived at the said tavern at dawn,[2] in said Summary, Number 2, Letters F and L.[3] For if no evil had been done, she would surely not have attempted to conceal the truth, as is well said by Riminal. Jun. on this subject, cons. 274, n. 64 to 67.[4]

[1] evadit efficacior. [2] in Aurora. [3] LXXXVI, 94. [4] Pompilia, in her examination, Letter F, LXXV, 94, said: "We arrived at dawn" (all' alba, break of day); and she asseverated the same in Letter L, LXXXVI, 94: "Io per la verità arrivai a Castelnuovo al rosseggiar dell' Alba." Even Caponsacchi, however, said they arrived the night before; and the falsehood of Pompilia was clearly proved. Bottini himself admitted this in his argument, § Et quamvis, CLXXXI, 187, post sec. 97, and boldly attempted to justify it; Lamparelli copies him, § Parum refragante, CCLIV, 250. Browning's ludicrous explanation is that Pompilia fainted at sunset and when she awoke the next morning it was early dawn, so that "she mixes both times, morn and eve, in one." Ring and Book, III, 1193, VII, 1580. A. K. Cook, pp. 156, etc., and Appendix V, analyzes the testimony very well.

AUTHORITIES

In Hipp. Riminaldus, cons. 274, n. 64, the accused woman told a number of interesting lies to conceal her lapse.

Section 24.

[Arch., Pam. 8, cxi, 119, § Quo circa nemo.]

Therefore unless I am mistaken, no one who knows what we have recounted can be found so silly and weak-minded as not to believe firmly, that when they were found in the tavern on their journey, her matronly modesty had been violated,[1] either while they were resting during the night, or in the morning to revive themselves.

[1] temeratus: profaned, desecrated. Mr. Hodell translates: "tampered with." [2] ad se refocillandos, late Latin, Mr. Hodell translates: "enjoying each other's society." To "refocillate," meaning to revive or refresh, is unfortunately obsolete in English. Aubrey, in his Letters from the Bodleian Library, says of Prynne that "about every three hours his man was to bring him a roll and a pot of ale to refocillate his wasted spirits." I am indebted for this quotation to Adrian H. Joline's Diversions of a Book-lover. I thank thee, Sir, for teaching me that word.

Section 25.

[Arch., Pam. 1, xi, 13, § Ultra quod hic.]

Furthermore, the question here is not as to the proof of adultery in order that punishment may be inflicted [upon the adulteress], but for the purpose[1] of excusing her slayer, and for his defense; in which case lighter proofs would be entirely sufficient,[2] as Matthaeu advises de re Crim. contro. 11, n. 25.

[1] ad effectum. [2] exhuberarent.

Authorities

Matthaeu, cont. 11, n. 25: the case of Joannes Vecino, translated in Appendix No. 3; this authority directly supports the text as the cases are very similar.

Section 26.

[Arch., Pam. 8, cxii, 120, § Praesertim quia.]

Especially[1] [is this true] because even if we should be deprived of this proof,[2] yet their carnal intercourse would remain[3] more than sufficiently proved for the purposes of our argument,[4] for our argument does not concern the infliction of punishment upon the adulteress, but we are bringing the fact of adultery before the Court by way of defense,[5] as Matthaeu observes in the exact case, contro. 11, n. 25; and in a stronger case, Spada, cons. 83, in the beginning, book 1. For it is according to the regular practice, that adultery may be abundantly[6] proved by presumptions for a civil purpose[7] such as separation from bed[8] or loss of dowry. Hostien. in cap. Litteris, after n. 4, verb. Divortii; and on that text Butrius, n. 6, de praesumpt.; Socin. Jun. cons. 32, n. 9, at the end, book 2; Ferrett. cons. 168, n. 4; Bertazzolius cons. crim. 20, n. 8.

[1] praesertim, Mr. Hodell translates "certainly." [2] Si ab eo praescinderemus; probably for praescinderemur, if we should be cut off from this argument, i.e., that advanced in the preceding § Demum sententia, cxi, 120, Ch. VII, sec. 8, as to the decree being res judicata. [3] probata remaneret. [4] ad effectum de quo agitur. [5] sed adulterium excipiendo deducimus: Mr. Hodell translates: "we have deduced the adultery for the exclusion of a penalty." [6] exhuberanter. [7] The argument is that although for the punishment to be inflicted for the offense, exact proof is necessary, yet where the adultery is to be proved as a matter of defense or excuse collaterally in another proceeding, proof by presumption is sufficient, just as it is in civil cases, which do not involve the infliction of punishment on the adulteress. The argument is repeated with additional authorities in § Nec relevat, cxii, 120, post sec. 47, as to proof by a single witness. [8] ad separationem thori.

Authorities

These authorities have been cited in preceding sections, e.g., § Ex osculis, xi, 13, sec. 19; § Ex condormitione, xi, 13, sec. 21. The reference

to Bertazzolius is also in point. This writer was a native of Ferrara, counsellor to the Duke and an Ambassador. His consilia are interesting, and cited about twenty times in the O. Y. B.

Section 27.

[Arch., Pam. 8, cii, 110, § Quamvis nobis.]

Although, as I have said,[1] it would be enough for our side, in order that Count Guido should not be lawfully convicted, that his confession should be received as a whole,[2] without dividing it; nevertheless by way of abundance[3] we produce full proofs of adultery that result from the Prosecution for Elopement, which the Fisc endeavors to oppose lest he should give up his case;[4] and the Achilles of his assertion[5] is an unsupported affidavit,[6] not admitted into the record of the prosecution but circulating around outside of it,[7] of a worthless[8] woman, a former maid servant in the home of the Accused, who was severely injured with blows by Guido himself, by the Canon his brother, and by their mother;[9] and who far too insincerely[10] recounts the very bad treatment suffered by Pietro and Violante de Comparini and by Francesca, their daughter and Guido's wife respectively,[11] especially as to their food, for which reason [it is alleged] Pietro and Violante thought it better to return to Rome; Summary of the Fisc, Number 1;[12] although Count Guido by a written agreement had bound himself to provide maintenance to the said couple![13] And moreover it is inferred (from the said affidavit) that the escape of Francesca was necessary on the ground that she was harassed[14] by threats of death, so that her depraved desire of violating her marriage vows could not be deduced therefrom.

[This is in reply to Bottini's argument, Pam. 6, § Et quidem, et seq. lxix, 75, post sec. 63.]

[1] in preceding sections, § Confessio D. Guidonis, CI, 109, Ch. V, sec. 17. [2] in totum. [3] ad abundantem; for abundantiam? [4] ne daret manus victas: give up his conquered hands (to be bound). [5] Achilles praetensionis. [6] unicum examen; i.e., the deposition of only one witness and objectionable for that reason, on the ground of "unicitas." The reference, of course, is to the deposition of Angelica Battista, Pam. 4, XLIX, 49. Not as Mr. Hodell translates: "a preposterous cross-examination," although it was preposterous. Unicum does not mean preposterous and examen does not mean cross-examination. [7] extra vagans. [8] vilis mulierculae. See Glossary. [9] The meaning is either that Angelica merely claimed that she had been thus beaten; or that, having been so beaten, was inspired with a desire for revenge; more probably the latter. [10] nimis affectate. [11] respective. [12] XLIX, 49. [13] parenthetical and "sarkastikal." If the real trouble had concerned their maintenance, Pietro and Violante would have compelled it by virtue of their contract. Archangeli claimed that they went to Rome for other reasons. [14] minis mortis affectae.

Section 28.

[Arch., Pam. 8, CIII, 111, § Sed si veritatem.]

But, if we love the truth, the domestic affairs[1] of the accused were not so straitened as to have been insufficient[2] for their living, not merely frugally but even sumptuously, as is shown by the theft of money committed by Francesca in the act of her elopement; see in the Record of proceedings, pages 5, 63, 92.[3]

[1] res familiaris. [2] ut non exuberasset. [3] See the Sentence of the Criminal Court at Florence, V. 5, giving a list of the articles stolen, including 200 crowns in money, jewelry, etc. The Anonymous Pamphlet, No. 15, or "Risposta alle notizie di fatto," CCXVII, 219, says that part of this money was returned by Pompilia during her trial.

Section 29.

[Arch., Pam. 8, CIII, 111, § Causa vera.]

The true and real cause which moved Pietro and his wife to go back to Rome was, without the slightest doubt,[1] that Guido's mother could not

bear that the aforesaid Comparini[2] should direct the house-keeping, and arrange at their own pleasure everything pertaining to the management of the home[3], which they very ardently, but not less boldly, desired to do; and because [secondly] Pietro moreover took it ill that he was censured for leaving the company of the nobility, and associating constantly with the commonest persons at the taverns, to the scandal of respectable men, and still more because he was compelled by the Governor[4] of the city through fear of punishment, to restore certain trinkets and jewels belonging to his daughter, which he had taken away, as Guido testified in his examination, pages 96 and 97;[5] and this is admirably proved by the letter of the said Governor, recently produced by us, which we give in Summary, Number 1.[6]

[1] infallibiliter. [2] conjuges de Comparinis; as the society editor would say, "the Peter Comparini's." [3] ad gubernium domus spectantia. [4] Praeses. [5] Guido's examination is unfortunately not preserved to us. [6] LXXXI, LXXXII, 89, 90.

Section 30.

[Arch., Pam. 8, ciii, 111, § Quibus adstipulatur.]

With these statements agrees the judicial examination[1] of the said Francesca when she was imprisoned[2] in her elopement, in which we nowhere read that she had been badly used, or that she even complained of the poverty of the home, that we have heard so much talk about;[3] and nevertheless it is extremely probable that in order to gloss over[4] her elopement, she would have recounted[5] the necessities of the household and the wretchedness of the home, if she had suffered anything of the kind.

[1] examen judiciale; Mr. Hodell translates, "cross-examination." [2] carceratae; Mr. Hodell translates, "arrested." [3] de domus decantata paupertate; Mr. Hodell translates, "that home of decent poverty." See note on decantare, s.v. cantare in Glossary. It might here be rendered "reiterated" or "oft recited." [4] cohonestandam: to do honor to or grace; hence palliate, as here. [5] deduxisset.

Section 31.

[Arch., Pam. 8, ciii, 111, § Non negamus.]

We do not deny that disputes immediately arose between Francesca and her husband, and perhaps he had threatened her with death, but that was for another reason, namely, in order that she should give up the illicit amours which she had begun at the suggestion of her parents and that she should live honorably as was proper;[1] as is to be read expressly[2] in her deposition, our Summary, Number 2, Letter A.[3]

[1] ut par erat; Mr. Hodell translates: "that she should live with evident chastity." [2] expresse. The reference is to that part of Pompilia's examination where she speaks of Guido's jealousy of Caponsacchi. [3] lxxxiv, 92.

Section 32.

[Arch., Pam. 8, ciii, 111, § Hinc verificatur.]

[What we have said] is verified from what Francesca herself, in her letter written to the Abate Franceschini, frankly confesses (in the Summary of the Fisc, Number 4,[1] and in our Summary, Number 3),[2] namely that her parents were sowing tares between the husband and wife and were advising [her to have] recourse to the Very Reverend Bishop under the false pretense of bad treatment, and were instigating her by day and night, to do away with her husband, his brother,[3] and her mother-in-law by means of

poison, to burn the house down and what is more shocking, to allure a lover and return to Rome in his company; even as in many of these matters she did not neglect to obey them.

[1] Pam. 4, LV, 56. Letter to the Abate dated June 14, 1694.
[2] Pam. 7, LXXXVIII, 95. Letter to the Abate dated July 19, 1694.
[3] Mr. Hodell translates: "her brother."

SECTION 33.

[ARCH., PAM. 8, CIV, 112, § ET IN ALIA.]

And in another letter written to the said Abate and also presented by us and given in our Summary, Number 4, we read: "Not now having those here who urge me to evil."[1]

[1] Pam. 7, LXXXVIII, 95.

SECTION 34.

[ARCH., PAM. 8, CIV, 113, § PRIMORDIUM VERITATIS.]

The foundation of the truth[1] of the said letter of which we are speaking,[2] we gather from the said letter of the Governor of Arezzo in our Summary, Number 1, where it is said: "Of much greater scandal were the flights and petitions of the said wife, their daughter, to Monsignor the Bishop. These were made for no other reason than that neither she nor her parents wished to stay longer in Arezzo but desired to return to Rome. When she had been rebuked by that most prudent Prelate he always sent her home in his carriage."[3]

[1] Primordium veritatis; generally in the plural, primordia.
[2] The letter spoken of here is that written by Pompilia to the Abate Paolo, which it is claimed had been written by Pompilia under compulsion of her husband. The argument is to show the truth of its statements by the corroborative evidence contained in the Governor's letter. Pompilia's letter is dated June 14,

1694, LV, 56. [3] Letter dated August 2, 1694, LXXXI, 89. Of course, this we should reject as hearsay evidence, but it was not so considered in the days of the O. Y. B.

SECTION 35.

[ARCH., PAM. 8, CV, 113, § IDQUE SIMILITER.]

And this is likewise clearly shown by another letter of the Very Reverend Bishop which is given in the Summary, Number 6, where he says: "The more she made outcry, that much the more she had been urged thereto by the instigation of her mother."[1] And after interposing a few words, he continues: "I have some knowledge of this because Senator Marzi-Medici, who presides over the secular government of this city for our Most Serene Grand Duke, has told me all."[2]

[1] Letter to the Abate Paolo dated September 15, 1694; XCI, 99.
[2] Same letter.

SECTION 36.

[ARCH., PAM. 8, CV, 113, § VERIFICATUR ULTERIUS.]

It is further corroborated[1] by another letter of Signor Bartolomeo Albergotti, produced on the other side, which is given at the end of their Summary, Number 2,[2] but not in its entirety; for where it has it that Guido and his mother had been advised by the Secretary of the Very Reverend Bishop it there says: "Not to maltreat the Signora for the affront offered him. After disputes enough of this kind he took the Signora back home. And she declared that she was absolutely unwilling to live with Signora Beatrice and with the Canon Girolamo, her brother-in-law." And after a few words: "I pray yourself and Signora Violante to be willing to offer a remedy by instilling the wife

with a tranquil peace which will be for the quiet of all," as we read on page 190 reverse.

[1] verificatur. [2] Pam. 4, LIV, 55.

Section 37.

[Arch., Pam. 8, CV, 113, § Quod comprobatur.]

And this is confirmed by the letter of the Abate produced by the other side, page 182 of the Record, where we read: "By Signor Guido, my brother, several offers have been made to them, but have not been accepted; and they insist that we force our mother and the Signor Canon to leave the house. But this will never be, even if there do not follow both love and concord, I will never advise that."[1]

[1] This letter is not contained in the Summaries.

Section 38.

[Arch., Pam. 8, CV, 113, § Et ab epistola.]

And by the letter of Signor Romano, page 188 (reverse)[1] of the Record, where we read: "I have known why she fled to Monsignor, and it was because she did not wish to live with the Canon and Beatrice;" which words are not noted in the said Summary of the Fisc, Number 2.[2]

[1] 188 a ter; i.e., on the reverse or unnumbered side of the folio, not as Mr. Hodell translates, "later." [2] Letter from Romano to Pietro Comparini; Summary of the Fisc, Pam. 4, LIV, 54.

Section 39.

[Arch., Pam. 8, CV, 113, § Ecce igitur.]

You see then that Francesca was not badly treated, although she deserved to be badly treated, because of her insincere[1] and unseemly recourse without cause to the Very Reverend Bishop. Hence

it is evident whether the Comparini couple[2] left Arezzo and Francesca fled away because of bad treatment.

[1] ob affectatum recursum; Mr. Hodell translates: "eager." See Glossary. [2] Conjuges de Comparinis, "the Peter Comparini's."

Section 40.

[Arch., Pam. 8, civ, 112, § Inanis est.]

The answer is vain that the characters[1] of the letter first mentioned had previously been separately[2] traced by Guido, and then marked over[3] by her with a pen drawn over the tracing; as she asserts in our Summary, Number 2, Letter K;[4] for proof of which statements she was able to produce nothing except that she did not know how to write; Summary, Number 2, Letters B, H, and K.[5]

[1] elementa, the a, b, c's. Literally, the letters of the letter. [2] singula elementa designata. [3] efformata. [4] lxxxvi, 94. [5] lxxxiv, 92; lxxxvi, 94.

The letter from Pompilia to her brother-in-law, lv, 56, is referred to in § Hinc verificatur, ciii, 111, ante sec. 32, and is found in the Summary of the Fisc and also included in Defendant's Summary, lxxxvii, 95. Pompilia testified in Letters I and K that her husband wrote the letter with a pencil and then made her trace it over with pen and ink. Bottini was too sensible not to appreciate the glaring improbability of this story and does not support it in his argument, § Ac propterea, clxxii, 179, post sec. 69; nor does Lamparelli in § Nam quoad, ccxlvii, 244. They argue as to the improbability of her having written (composed) a letter containing such sentiments.

Section 41.

[Arch., Pam. 8, civ, 112, § Nam Praeterquamquod.]

For, besides that she remains[1] most openly convicted of falsehood by her signature to the power of attorney[2] acknowledged by herself while in prison, as we find in the Prosecution for Elopement,

page 39, and by her other signature to the marriage articles, the authenticity of which it is sacrilege to dispute[3] not only because it is subscribed by one of my Lords Cardinal,[4] but also because her handwriting[5] was likewise acknowledged by her when she subscribed it at the request of the Notary, as may be seen in the copy[6] remaining on file in the Proceedings, page 132 — besides all that, she is furthermore[7] refuted by the Ecclesiastic[8] with whom she took flight, who asserts that frequently at night he received letters which she threw out of her window, and others sent by the maid whose deposition we give in our Summary, Number 5, Letters A, B, C, D. And this is verified by a witness for the Fisc, page 108, where we read: "And she threw down a note, as I saw very clearly, and the Canon picked it up and went away." [All this is] in addition to the letters and scraps of paper,[9] containing their mutual love, discovered in the prison[10] at Castelnuovo, where they themselves were discovered. Since it appears impossible that the written characters[11] of these letters were in like manner[12] traced out by her husband, and we are not informed by whom [else] they were written, it must accordingly be presumed that she wrote[13] them herself lest she might disclose her forbidden amours which had to be concealed with the greatest care.[14] And I pray that the aforesaid letters be submitted for ocular inspection, and it will be accurately perceived whether the characters had been inked over [15] by one who did not know how to write, in imitation of the letters, or rather by the expert hand of the woman herself.

[1] remanet, auxiliary use, has been and still is. [2] in mandato procurae; Mr. Hodell translates: "by her signature which was recognized by herself at the command of the Court while she was

in prison." Mandatum procurae is the regular term for power of attorney, and this may have been her appointment of the procurator. It was acknowledged by her before a notary, hence "recognita." This power of attorney is not reproduced in the O. Y. B. [3] de cujus veritate, nefas est disceptari. [4] The Cardinal Lauria drew the marriage articles and witnessed their execution. See note to § Nupserat sinistris, IX, 11, ante sec. 1. [5] caracther. [6] copia. [7] This section begins Nam praeterquamquod and the construction is carried all the way to "et insuper," as indicated in the translation. This is an example of the broken style of the arguments, showing probably the haste with which they were dictated. [8] ecclesiastico, not priest. [9] schedas: notes. [10] In other sections the letters are stated to have been found in the latrine — probably the latrine of the inn or that of the prison. See § Ac propterea, CLXXII, 179, post sec. 69. [11] illarum elementa. [12] pariformiter. [13] exaratas: literally as we might say "scratched off," see Glossary. Mr. Hodell translates, "devised." [14] That is: of course, these love letters could not have been written by Guido, and their contents being what they were, it would have been highly imprudent to have had them written for her. No such other person is alleged to have done it, so it must be presumed that she wrote them herself. [15] atramento efformata: marked over with ink.

Pompilia's excuse that she could not write appears entirely too thin, and Archangeli disposes of it. Possibly at the time of her marriage she was not expert; but these love letters were written much later. No one seems to have questioned the authenticity of the letter written by Pompilia at Castelnuovo to her parents, CLV, 160; and in fact Bottini, § Satius quidem, CLXXIV, 181, post sec. 77, bases an argument upon it, and on some of these very love letters. According to Matthaeu et Sanz, cont. 28, n. 68, Pompilia might have been forced to write so as to compare her writing with the disputed letters, the comparison being made by experts as well as the Judges. The procedure is given by Martinus, Praxis Criminalis, 147.

The authenticity of Pompilia's letters is elaborately examined by A. K. Cook, App. IV. With all his predisposition in favor of Pompilia, he admits that the authenticity of the love letters is very doubtful, but thinks her letter of May 3, 1697, to her parents is genuine, while those to the Abate Paolo were "probably faked."

Section 42.

[Arch., Pam. 8, CV, 114, § Restat modo.]

It remains now that we see — setting aside[1] the bad treatment — what excuse in the world[2]

Francesca had for running away from her husband's home, or rather, whether her elopement were [not] scandalous, which will not be difficult to perceive, if we linger for a little while upon the deposition of the said Francesca, and the letters found in the prison of Castelnuovo, which were produced by the Fisc in the prosecution, although they were not authenticated.[3] His carelessness[4] cannot hurt our case, nor do I think it can for that reason[5] be disputed that they are in the same handwriting, if they be compared with the proved handwriting of the power of attorney.[6] Furthermore as they contain love affairs, and the name of Guido himself, no sensible man will think that they were not written by the same persons.

[1] cessantibus; the bad treatment being absent, or out of the case. Mr. Hodell translates: "even granting this ill treatment." [2] quamnam; vide T. H. Key Latin-English Dict. [3] recognitae, or, acknowledged by her; Mr. Hodell translates: "though they were not given recognition." [4] That is, the oversight or carelessness of the Fisc in not offering technical proof of the letters. Mr. Hodell translates "negligentia" as "the lack of this acceptance." The argument of Archangeli is perfectly clear. The Fisc had offered these letters in the Prosecution for Elopement, and could not in the present trial object to them on the ground that he had then failed to make technical proof of them. Probably in the trial for elopement nobody thought of disputing their authenticity. [5] ideo, that is, on the technical ground of lack of formal proof. [6] Here again Mr. Hodell translates "caracthere certo mandati procurae" by "assured writing of the command of the Court." Mandatum procurae is simply a power of attorney.

Section 43.

[Arch., Pam. 8, cviii, 116, § Patet igitur.]

It is therefore clear, whether Francesca had an honest reason for going away from her husband's home, or was rather incited by the urgent spurs of love. It may now be said that letters of this

character were sent for a good purpose in order that the Canon[1] should be allured to accompany her so that she might escape the danger of death, in which she found herself without just reason, and that she was able to preserve her chastity in the society of her lover; but since it is certain[2] that the amorous expressions[3] contained in the said letters do not manifest chastity of mind, and a modest disposition, and as a just reason for her elopement is certainly lacking, the veil falls down with which her lust was alleged to be screened. I admit that Judith, a most virtuous widow, of handsome appearance, bedecked herself elaborately[4] and pursued with her attentions[5] a most licentious enemy, but this was to accomplish a patriotic duty, that is, to free her native country; she, however, was not protected[6] by dispatching wanton letters beforehand, but by her glowing discourse,[7] of whose inviolate modesty it would be impious to doubt, since indeed she was impelled by the inspiration of the Holy Spirit: — Today, in truth, how very few Judiths are found! but the daughters of Lot are multiplied; who since[8] they were unable to preserve their proper modesty at their father's table, made him drunken with wine, lest forsooth he should when sober deny them what they were passionately demanding,[9] so that while deprived of his reason he was involuntarily polluted with unholy incest. Genesis, ch. 19: — Do we believe that a girl who was dying for Love, who was ardently burning for the society of this Cupid, so loving and beloved, could have kept her honor intact in their long elopement? Which honor would that she had kept in her husband's home![10]

[1] Ecclesiasticus. [2] dum pro certo. [3] amorosae expressiones.
[4] viduam decora facie et undique ornatam; Mr. Hodell translates:

"of decorous appearance and fine looking in many ways," a lukewarm compliment. The passage refers to Judith's adornment of her person in order to captivate Holofernes. "She put her chains about her and her bracelets and her rings and her earrings and all her ornaments, and decked herself bravely, to beguile the eyes of all men that should see her." Judith x, 4 (Ed. Charles). [5] perrixisse: for porrexisse (?); offered or held herself out to Holofernes. [6] munitam, protected, in what she did, or in her reputation. But see DuCange and D'Arnis, munitus = ornatus vesti assutus, ornament, as passementerie, etc., i.e., completely adorned, but not with wanton letters dispatched beforehand. [7] orationibus ferventibus. Holofernes praised her beauty of face and wisdom of words. It is possible that ferventibus may be a misprint for servientibus, i.e., serviceable to the purpose, appropriate. [8] si. [9] imo ne sobrius quod impotenter efflagitabant; Mr. Hodell translates: "lest he when sober should deny them because they were sinning weakly." [10] Bottini's unfortunate comparison of Pompilia with Judith, in Pam. 6, § Minusque subsistit, LXXIII, 79, post sec. 78, offered an opportunity for reply to Archangeli of which the latter was not slow to take advantage.

Section 44.

[Arch., Pam. 8, CVIII, 117, § Et sane si iustum.]

And in truth, if a just fear [of death] had been occasioned her for an unjust cause, she would certainly not have increased [Guido's] suspicion of a depraved and sensual association[1] with the said ecclesiastic[2] by taking as her companion in her flight, him whom her husband had suspected, and who was not related to her or to her husband in any degree of relationship, by blood or marriage (as each of them confesses in our Summary, Number 2, Letter G[3] and Number 5, Letter E[4]), in such a way as to publish her infidelity as genuine; but, preserving the dignity of a married woman, she would either have entered some monastery through the assistance[5] of the Very Reverend Bishop[6] (if she had told him the truth and not falsehoods) or, if she had had recourse to the civil Governor,[7] he, after examining the whole matter, would have

either afforded her a safe return to the City[8] in the company of respectable men and women; or have placed her in the home of some respectable matron with due precautions; or if[9] she had confided in neither [the Bishop nor the Governor], and had made up her own mind[10] to return to Rome, she would at least have undertaken the journey with one of her servants.[11]

[1] conversationis. [2] Canon Caponsacchi; not priest. [3] Pompilia's deposition, LXXXV, 94. [4] Caponsacchi's examination, XC, 97. [5] mediante opera. [6] Reverendissimi Praesulis: perhaps meaning the Abbot of a monastery. [7] Praesidem laicum: for Gubernator, Praesul and Praeses contrasted. [8] Rome is always called *the* City — Urbs. [9] quoties. [10] et statuisset ex se. [11] This is a strong argument, and its force is admitted by Bottini in his reply, Pam. 13, § Satius quidem, CLXXIV, 181, post sec. 77.

Section 45.

[Arch., Pam. 8, CIX, 117, § Prout labitur.]

Likewise the other excuse for glossing over[1] her unlawful amour falls to the ground, namely, that another ecclesiastic[2] was acquainted with the aforesaid matters who was a brother-in-law to the sister-in-law of the said Francesca; since, if the aforesaid letters are carefully read over, the suspicion of illicit correspondence[3] with his connivance is very greatly increased. We read in Letter 11: "You tell me that Conti is unwilling to bring letters to you. But let me inform you that I am wheedling him; and I have the wit to bring it about that he will carry them for you. Because I say two kind words to him, and he is charmed, and will do what I wish."[4] And in her lover's letter 19 we read: "For he [Conti] has told me that now he [Guido] is more jealous than at first, and that if he finds out about anything, he will wish to avenge himself."[5] But any one may judge whether we

can deduce from these words that their mutual love was chaste [simply] because another ecclesiastic knew about the aforesaid matters. I know, however, that for Francesca to show herself at the window at the hiss of her lover in the company of the other ecclesiastic had a bad odor,[6] as a witness for the Fisc testified in the Prosecution for Elopement, pages 107 (reverse) and 108. Therefore it was not without cause that Guido was suspicious of the second ecclesiastic[2] also, as Francesca herself asserted in her deposition in our said Summary, Number 2, before Letter A.[7]

[1] ad cohonestandum. [2] ecclesiasticus, not priest. [3] correspondentiae. Correspondentia, either correspondence by letter or intimacy. [4] XCVI, 103. [5] XCVIII, 105. [6] non bene olebat. [7] LXXXIII, 91.

Section 46.

[Arch., Pam. 8, cix, 118, § His Praehabitis.]

These things being borne in mind, namely, that [first] it is not established[1] that Francesca was threatened[2] with death without just and lawful cause; [secondly] that on the contrary[3] there was established[1] a most suspicious correspondence[4] with her lover, the consequence will follow[5] that these threats were offered by her husband to preserve his honor, and so it was in Francesca's own power to free herself from his aforesaid threats without scandal, without flight, without disgrace, but by living chastely. But she being entirely too prone to the tickling[6] of the flesh, put aside everything to fulfill her lust, without any regard to the violation of her conjugal fidelity, and of her desecration[7] of this it would be inconsistent to doubt, since it manifestly appears from the matters brought out in the prosecution, and especially from the reciprocal love between the

lovers, as is remarked in a decision of the Rota Divers. dec. 95, n. 6, par. 2, and from their letters containing such very tender expressions.[8] Ancharan. in cap. Praeterea, n. 3, and on that text, Felin. n. 3, de Testibus; Paris. cons. 54, n. 64, lib. 4; Riminald. Jun. cons. 274, n. 9, lib. 3; Mascard. de probat. [Vol. 1] conclus. 64, n. 10, at the end.

[1] constito. [2] perculsa from percello, or for percussa from percutio? [3] imo. [4] correspondentia, correspondence or acquaintance, intimacy. [5] consequens erit. [6] tintillo for titillo, a late word for titillatio. [7] temeratione, temeratio from temerare, to violate, profane, desecrate. Mr. Hodell translates: "utter recklessness" as though the word were derived from temeritas. [8] expressiones.

This section contains a repetition of the arguments and some of the authorities in § Ex litteris amatoriis, XI, 13, ante sec. 8.

AUTHORITIES

Rota Divers. dec. 95, n. 6, previously cited; reciprocal love is a great adminiculum or presumption. Riminaldus, book 3, cons. 274, n. 9. See § Ex litteris, XI, ante sec. 8. Mascardus, vol. 1, conclus. 64, n. 10: "and so if love letters are found in the possession of a woman." Mascardus was Apostolic Prothonotary of Sarzana, a province of Genoa, and Suffragan Bishop of Ajaccio. He died in 1588. His Conclusiones Probationum, or De Probationibus, was a work of high authority, and is cited about twenty times in the O. Y. B.

SECTION 47.

[ARCH., PAM. 8, CXII, 120, § NEC RELEVAT.]

Nor does it matter that some of these violent presumptions are proved by single witnesses, because we are arguing to prove infidelity and adultery in general,[1] and not for the purpose[2] of condemning the adulteress, but for the defense of the accused, according to the opinion of a writer on this point[3] quoted in Sanfelic. dec. 337, n. 16 and 19; and before him, Clar., § final. quaest. 53, n. 19; Farinac. qu. 64, n. 223.

[1] in genere; Mr. Hodell translates: "adultery in kind." [2] ad effectum. [3] in puncto scribens. Cf. with this section § Praesertim quia, CXII, 120, sec. 26, ante.

AUTHORITIES

The decision in Sanfelicius 337 is often cited in the O. Y. B. Here quoted to the effect that the proof is not impaired by the fact that all the witnesses do not depose to all the facts; and that to prove the "res in genere" single witnesses are sufficient, provided they agree in the substantial matters that make to that end. Sanfelicius cites Clarus, who clearly draws the distinction between proof of a crime in specie and in genere according as the question concerns the infliction of a penalty, or the purposes of a defense. Farinacius, qu. 64, n. 223, collects the numerous authorities. Franciscus Sanfelicius was a Neapolitan noble; Judge of the High District Court (Magna Curia Vicariae), Patronus of the Fisc, and Regent of the Royal Chancery. His decisions are often cited.

SECTION 48.

[ARCH., PAM. 8, CXII, 120, § ET RATIO EST.]

And the reason is very evident, because in order that a husband may be excused for the homicide of his wife after an interval, exact proof of the adultery is not required, but a violent suspicion of adultery is more than sufficient,[1] as Sanfelicius affirms it was decided, decis. 337, n. 13. We moreover have to do with a stronger case, for we have not only violent suspicions (although adduced by single witnesses) but other [suspicions] also accurately[2] proved; yes, indeed, proofs of the clearest kind adduced by the Fisc.[3]

[1] superabundat. [2] exquisite. [3] The reference, of course, is to the testimony offered by the Fisc in the Prosecution for Elopement. Naturally Archangeli laid special stress on this testimony and the prosecution was placed in an awkward position.

SECTION 49.

[SPRETI, PAM. 9, CXXX, 137, § CAUSAM AUTEM.]

Nor can the causa honoris be excluded by the affidavits[1] of those who gave assistance to Francesca Pompilia continuously until her death, as to the declaration made by her that she had never violated her conjugal fidelity,[2] because these affidavits

are simply extra-judicial assurances,[3] which do not make proof.[4] Cyriac. cont. 61, n. 6, and contr. 284, n. 66; Rot. rec. decis. 290, n. 2 at the end, part. 3.

[1] attestationes. [2] de nunquam violata conjugali fide. [3] Attestationes * * * fides extrajudiciales, quae non faciunt fidem. [4] See as to fides in Glossary.

AUTHORITIES

The case cited from Rotae Decis. Recent. is not very apposite. That from Cyriacus, cont. 61, is: "the second affidavit about the sale made of 26 head of cows at the rate of 15 ducats each has no importance because proofs are not made by these extra-judicial affidavits, but only by judicial examination." The reference to contr. 284 is evidently a misprint. Franciscus Niger Cyriacus was a lawyer of Mantua who compiled this valuable work, the Controversiae Forenses, in 1628-1638, which is cited a dozen times in the O. Y. B. The Misses Porter and Clark in their note on The Ring and the Book, VIII, 940, and Dr. Berdoe in his Browning Cyclopedia, identify this writer with a Syrian monk, died 817, "who wrote homilies, canons, and epistles."

SECTION 50.

[SPRETI, PAM. 9, CXXX, 138, § ET QUATENUS, VERS. ET SICUTI.]

And as just as no credence should be given to Francesca Pompilia herself; — especially as she was deposing extra-judicially, and not under oath, Foller, in practic. in the second part of the third principal part, verb. Et si confitebuntur, no. 9 et seq., with other authorities cited by Farinac., qu. 43, n. 23 — so also much less should credence be given to the aforesaid witnesses lest greater credit should be afforded to the copy than to the original, according to the familiar[1] cap. Fraternitatis de haeretic; Farinac. qu. 69, n. 85; Cyriac. cont. 250, n. 9.

[1] vulg.

AUTHORITIES

Follerius (the subdivision of whose work is peculiar, *Et si confitebuntur* is the Rubric of the third part) refers to a case where the extra-judicial confession is extorted by fear or the threats or the persuasions

of the real delinquent in order to relieve himself of suspicion. This and the citation of Farinacius, qu. 43, n. 23, do not seem applicable.

Cap. Fraternitatis de haerct. (Decretal, Book V, Title VII, cap. 4) is "Damnato auctore, damnantur eius scripturae et libri et opera." Farinacius, qu. 69, n. 85, is to the effect that an extrajudicial confession by one not in the jurisdiction of the court that he, and not the accused, committed the crime, will not avail the accused. Cyriacus, cont. 250, n. 9, is in point. He says, "and whenever any one is not to be believed, those also prove nothing who heard it from him."

Section 51.

[Spreti, Pam. 9, cxxx, 137, § Praesertim cum.]

Especially since they were obtained by force and entreaty[1] while the suit was pending, and the other side not summoned, by the heir of the said Francesca Pompilia in order to escape the annoyances[2] offered by the Monastery of the Convertites, which was laying claim to the succession of the property on account of her infidelity;[3] and which [monastery] for this reason had caused all of her inheritable property to be sequestered and judicially inventoried.[4] Roland. cons. 40, n. 5, book 1; Cyriac. said cont. 61, n. 6; Rot. recen. decis. 23, n. 4, part. 2, and decis. 221, n. 14, part. 16.

[1] emendicatae. [2] vexationes. [3] ex causa inhonestatis. See as to the Convent of the Convertites, post Ch. XII. [4] Mr. Hodell translates: "Such shame would cause all of her hereditary property to be sequestered and judicially assigned to the said monastery by law." Describi means "written down in an inventory."

Authorities

The citation from Rolandus a Valle concerns a case where a witness under oath contradicts what he has said extrajudicially. The first case from Rotae Recen. Decis. has to do with an affidavit pendente lite, but the second must be an erroneous reference or a misprint. Cyriacus, cont. 61, n. 6, says such affidavits are made to please the parties.

Section 52.

[Spreti, Pam. 9, cxxx, 137, § Maxime cum.]

And very especially [is this true] because some of the witnesses, who deposed as above stated, are

legatees under the will of Francesca Pompilia; so that they[1] have deposed in their own interest; for, if her infidelity were substantiated,[2] her property would devolve to the said Monastery, and consequently they would be deprived[3] of their legacies; l. nullus ff. de Testib. [Dig. 22, 5, 10]; l. omnibus C. eod. [Cod. 4, 20, 10]; Cravett. cons. 99, n. 2, and cons. 112, n. 10; Bertazzol. cons. crimin. 60, n. 8, book 1.

[1] ipsi. [2] subsistente inhonestate. [3] ipsi remanerent exclusi. Note the use of *ipsi* in this section and *remanere* as an auxiliary.

AUTHORITIES

The text in the Digest is the well-known general rule, "Nullus idoneus testis in re sua intelligitur," followed in Cravetta and Bertazzolius.

SECTION 53.

[SPRETI, PAM. 9, CXXX, 138, § ET QUATENUS.]

And assuming that[1] [these affidavits themselves] are entitled to credence,[2] a declaration of this kind amounts to nothing[3] because no one is presumed to be willing to reveal his own disgrace, according to the opinion given in a similar case,[4] Rot. divers. par. 4, decis. 276, n. 4.

[1] quatenus. [2] fidem facerent. [3] ad nihilum deserviret: deserves no credit? See Glossary. [4] in his terminis.

AUTHORITIES

Rot. divers. Par. 4, decis. 276, a curious case, but applicable here.

SECTION 54.

[SPRETI, PAM. 9, CXXXI, 138, § NEC VALET DICI.]

Nor can[1] it be said that no one is presumed to be unmindful of his eternal salvation; because all are not presumed to be Saint John the Baptist, as Baldus says in tit. de Pac. Constant. verb. Vassalli il [illi] primo in usibus feudorum; especially when

the argument concerns the prejudice of a third[2] person; Bartol. in l. si quis, § si quis moriens ff. ad Senat. Consul. Syllan. [Dig. 29, 5, 3, 1]. In a stronger case, Marsil. in pract., § Restat. n. 12 and 16 at the end; Bertazzol. cons. crimin. 234, in the first section, book 1; Prat. respons. crim. 23, n. 32 et seq.; Rovit. Super pragmat. Regn. tit. de recept. delinquent. pragmat. 6, n. 5; Farinac. in said qu. 43, n. 28, with the two following sections and qu. 46, n. 72; Hieronim. Laurent. decis. Avenion. 15, n. 16, in connection[3] with n. 8. And this is more so when the argument goes to the effect of more severely punishing the enemy of the very person who makes the declaration. Mascard. de probat. conclus. 144, n. 8, et seq.

[1] nec valet. [2] I suppose, a third person other than the person making the declaration and the person primarily affected. Mr. Hodell translates: "*the* third." Pompilia made these statements as to her innocence in connection with the suit or threatened suit of the Convertites. As to this suit, Guido was a third party. [3] juncto.

AUTHORITIES

Bertazzolius, cons. 234, n. 1, and Rovitus Super Prag. De receptatoribus are somewhat different cases, as the declarations implicating associates in crime were made by criminals condemned to death and were dying declarations in that sense. According to Farinacius, qu. 43, n. 28, etc., where he cites numerous authorities, the statement of a companion in the crime does not produce an "indicium" for torture, even if he persevere in it until death; for although one who is very near death or actually dying is not presumed to be unmindful of his eternal salvation, yet he is not presumed to be Saint John the Baptist and Evangelist, and so is not always presumed to tell the truth; and so far as any one is presumed to tell the truth in the moment of death, this does not hold good, where the question involves the prejudice of a third party, citing from Hieronymus Laurentius the case here referred to where two criminals by their statements endeavored to inculpate another, which were held ineffective although they persevered to death. The citation from Farinacius, qu. 46, relates to the exculpation, by dying declarations of a criminal, of one whom he had previously inculpated. Such cases differ, however, from Pompilia's declarations asserting her own innocence; see the distinction in Archangeli's argument Pam. 8, CXII, 120, § Parum obstante, post sec. 56, where he refers to some

of these authorities. Mascardus in conclus. 144, here cited, gives in n. 10 the opinion of Natta rather than his own views, which are not clearly expressed.

The orthodox belief as to John the Baptist was founded on the Gospel of Luke I, 41: "And it came to pass that when Elizabeth heard the salutation of Mary, the babe leaped in her womb; and Elizabeth was filled with the Holy Ghost." (Compare Luke I, 15.) Now as the presence of any sin whatever is incompatible with the indwelling of the Holy Ghost in the soul, it follows that at this moment John was cleansed from the stain of original sin, Catholic Encyclopedia, Art. John the Baptist, and this is the reason that the Nativity of John is celebrated rather than his death.

The argument on the other side, to which this is an answer, is presented by Bottini in Pam. 6, LXXV, 82, § Omnemque praetensae, post sec. 99, and Bottini's reply is in Pam. 13, CLXIV-VI, 173, § Talis autem, § Non relevantibus, § Exceptio vero, post sec. 100 et seq.

This reference to the Evangelist was one of the old favorite brocards of the law, so called; a *brocardum* or *brocardicum* being a legal axiom or pithy saying. (Cf. "Two Ancient Brocards" by H. Goudy, Essays in Legal History, 1913.) The etymology of the word is uncertain. Calvinus merely says it is a barbarous word and leaves it to the barbarians. Hoare Ital. Dict. seems to derive it from Burchardt (Burcardus), Bishop of Worms in the 11th century, who is said to have compiled a book of legal maxims. I do not know the authority for this. Crusius de Indiciis, Part. 1, ch. 10, n. 15, says that most dying persons endeavor to die without any burden on their conscience, and the note of his son, Jacobus Andrea, quotes Baldus in tit. de Pac. Const. § Vasalli nostri, n. 6, as having originated the brocard (or quasi regula) about John the Baptist. In Part. 1, ch. 20, n. 2, Crusius says: "another indicium is when one about to die confesses the crime and names his associates, which confession, so far as concerns his associates, has force only and so far as other indicia operate against them and that an indicium of this sort is cheap (vile)," quoting Wilhelmus Antonius that this is so although the dying man has received the body of Christ, and that as a rule a spontaneous confession to the prejudice of another has little or no force. He adds some curious instances, however, where the warnings of dying persons were followed by remarkable effects.

Mr. Wigmore in his treatise on Evidence has minutely examined the subject of dying declarations in the Common Law, § 1430, etc. It would be tempting to quote, but considerations of space forbid.

Note as to the dictum of Baldus. The Pax Constantiae, or Peace of Constance, was the treaty of peace concluded at Constance by the Emperor Frederick (Barbarossa), his son Henry, and certain nobles, with the States of Lombardy, July 1183. This peace, as Bryce says, Holy Roman Empire, ch. XI, left the Emperor with little but a titular supremacy over the Lombard towns. The Pax Constantiae was annexed to the Liber Feudorum, and is included in the glossed editions of the Corpus Juris, with the commentary of Baldus. The section Vasalli,

quoted in the text, refers to the oath of fidelity to be taken by vassals, and Baldus discusses incidentally the effect of dying declarations in reference thereto. Baldus de Ubaldis was born at Perugia, 1327, and died 1400. He studied under Bartolus, was all his life a professor of law, and drew up the Statutes of Pavia. See Colquhoun's Summary, § 157.

Section 55.

[Spreti, Pam. 16, ccxxviii, 231, § Est autem pulchra.]

It is besides a pretty pretense to try to exclude the clearest proofs[1] of adultery by the word of the very woman who was convicted of it, and by reason of it detained in the monastery, as my Lord, the Procurator General of the Fisc, frankly confesses; since it is clear that she was not bound even in the moment of death to disclose her own disgrace as we have proved in our present argument, § Et quatenus, and the sections following.[2] And since she led an evil life, not to say of the worst, to the destruction of the honor and reputation of her husband, we do her no injustice[3] if we are willing to presume that not even in the moment of death was she willing to come to her senses, according to that saying, "Chi mal vive, mal muore" [he who lives badly, dies badly], and because no one, even in death, is presumed to be a Saint John the Baptist as [we said] in our argument § Nec valet dici.[4]

[1] liquidissimas probationes. [2] cxxx, 138, sec. 53. [3] nullam ei injuriam irrogamus. [4] § Nec valet dici, cxxx, 138, sec. 54.

Section 56.

[Arch., Pam. 8, cxii, 120, § Parum obstante.]

It is no sufficient objection to our argument[1] that Francesca, when near death, in order to

exculpate[2] herself and her lover, asserted that there had been no wrong-doing between them, because an exculpation of this kind, insincere[3] beyond measure as it was, might help[4] her companion [only] in case[5] she had previously inculpated him, and when his inculpation had been supported by no other proof,[6] and this [exculpation] would help her companion but not herself.[7] But, after she has been convicted[8] by the aforesaid proofs of having broken her marriage vows, it would be absurd that an exculpation made in order that she might seem to die an honest woman, should be of such great efficacy[9] as to refute the proofs of her own disgrace. Marsil. in Pract., § restat. n. 12 and 16, at the end; Bursatt. cons. 201, n. 14 [147]; Rimin. Jun. cons. 410 [420], n. 17; Farinac. qu. 46, n. 72. And what is more horrible, that by reason of her said exculpation he who killed her[10] might be more severely punished.

[1] Parum obstante quod. Note the use of the ablative absolute. [2] exculpatio * * inculpasset. See Glossary. [3] affectate. [4] suffragaretur; literally to help by vote. [5] quoties; often so used. See Glossary. [6] nullo alio indicio. [7] Mr. Hodell translates this passage: "For this kind of exculpation, which is all too much a matter of pretense, might help her companion just as theretofore she had brought blame upon him; and by no other proof might his inculpation have been removed. This would indeed aid her fellow, but not herself." The meaning seems, however, contrary. [8] convicta remanet, i.e., has been and remains convicted. [9] tantae efficaciae. [10] occisor, not murderer as Mr. Hodell translates.

AUTHORITIES

The reference to Bursattus, cons. 201, is a misprint. Farinacius, qu. 46, n. 72, citing other authorities, holds that an inculpation of an associate in crime, not supported by other proof or presumption, is removed by a subsequent exculpation, but this is not so if such proofs exist.

Matthaeu et Sanz says, contr. 18, n. 43: "Exculpatio tollit quidquid inculpatio intulit."

Section 57.

[Arch., Pam. 8, cxiii, 121, § Credo et sperare.]

I have faith, and this helps me to hope that her soul rests in the place of eternal salvation, by means of Divine aid,[1] since she had time to renounce[2] the life that she had previously led. But no judicious man would be able to commend her testamentary disposition of her property, in which she gave her son, just born and therefore innocent, and hidden from his father, only his legal share, as I hear, and appointed as residuary legatee a stranger, who was connected with her by no ties of marriage or blood.[3]

[1] mediante Divino auxilio. [2] detestari, to renounce or denounce; Mr. Hodell translates "hate." [3] filium * * solum * * in legitima * * instituit. That is, Pompilia gave her son only that portion of her estate to which he was absolutely entitled under the law following the Lex Falcidia. Mr. Hodell translates: "appointed as her sole heir her son * * and appointed as residuary legatee a stranger." If the son were made the sole heir, how could there be any other "residuary legatee" (in reliqua haereditate)? Mr. A. K. Cook, page 271, note 686, is perplexed by this passage.

B. ARGUMENT FOR THE FISC

Section

INTRODUCTION 58

POMPILIA WAS NOT GUILTY OF ADULTERY WITH CAPONSACCHI AS IS SHOWN BY THE FACTS OF THE CASE 61

I

Pompilia had legitimate reasons for flight, viz.:

a. The altercations in Guido's home, as shown by the letters of Abate Franceschini (especially as the Franceschini did not produce the letters to which his were replies) and also by the deposition of Angelica. 63

b. Her grief caused by her parents' return to Rome and her fruitless recourse to the Bishop and Governor. 65

c. Her letter to the Abate is no proof to the contrary; it was written in obedience to Guido, or rather traced over his handwriting, and its contents are incredible. 67

d. While the letters of the Governor, the Bishop, and Albergotti favor this reason for flight. 68

e. Another reason was her fear caused by the lawsuit which destroyed the conjugal peace. 71

f. And her husband's threats against her life. 72

II

As Pompilia had a just reason for leaving her home, no presumption of infidelity can arise from her leaving it in company with the Canon. Section

a. She chose the lesser evil. 73

b. And the participation of Canon Conti and of Guillichini shows her innocence. 74

c. Her journey by the direct road and with the greatest celerity shows that she had no improper motive. 76

d. Although it would have been more prudent to have placed herself in a monastery, or to have fled with some of her relatives. 77

III

No proof of guilt can be drawn from the alleged love letters.

a. There was no proof of the identity of the hand-writing, and although their language may be amorous, they might have been intended to allure Caponsacchi so that he might help her. 78

b. The jealousy shown in some of the letters was also feigned in order to entice him. 81

c. And her letters show that she supposed he would conduct himself with propriety. She rebuked him for having written immodest verses to her. 82

d. They were disregarded by the Judge in his decision. 84

IV

The other presumptions of guilt are of lighter weight. Section

a. The visits of Caponsacchi to Pompilia's home rest upon the testimony of a witness of bad character, and the evidence otherwise points to the effect that the visits were innocent, being for a proper purpose. 85

b. Her appearance at the window upon the Canon's signal was to attract him so as to aid her in her escape. 88

c. Her alleged deceit in her preparations for flight by giving a sleeping draught to her husband was a necessary and proper precaution. 89

d. The authorities that refer to a woman who, without just and probable cause, spends a night away from her husband's home, do not apply, as Pompilia had such cause. 90

e. The kissing on the journey was only proved by a single witness, who might have been mistaken. His testimony in the circumstances is impossible. 91

f. Nor is their kissing rendered more probable by the allusions in Pompilia's letters, which were made in order to entice the Canon. 94

g. Their sleeping together at the inn was not proved; and no presumption arises from their being together; 95

h. Or from Pompilia's false statement as to the time of their arrival at the inn; she lied in order to preserve her reputation for modesty. Section 97

i. No presumption can be drawn from the Canon's use of lay clothing. 98

V

On the other hand Pompilia's innocence is proved by her dying declarations. No one is presumed to lie at such a time.

The answers thereto by the defense are insufficient: —

a. The burden of proof rests on the accused, and as these affidavits are used only to weaken the proof of adultery, any mere informality should not be regarded. 102

b. That they were obtained by the heir pendente lite is no answer, as it was his duty as heir to obtain them. 103

c. That some of the deponents are legatees is no answer because their interest is inconsiderable, and there are a sufficient number of others who are not interested. 104

d. That no one is compelled to disclose his own disgrace is no answer, because as the adultery had not been proved, the presumption is that no one is willing to die unmindful of his eternal salvation. 105

Section 58.

[Gambi, Pam. 5, lxi, 65, § Deplorabile excidium.]

The deplorable slaughter[1] of the entire Comparini family, which occurred[2] in this fair City[3] on the night of the second day of the current month of January, and their blood then poured forth, cry out from the earth to God for vengeance upon the criminals; and we, in order to fulfil the duty of the office which we administer, have thought it worth while[4] to recount here with faithful pen, the facts of the case,[5] from which my Lords the Judges may be able to perceive more readily what laws are applicable[6] to the said facts for the determination of the cause, and of the punishment of the criminals, according to the admonition of the Text in the beginning of the final law ff. de jurejuran. [Dig. 12, 2], and because as Barbosa says in his Axioms of Law, axiom 93, n. 1: "Just as from the facts the law arises, so from the facts the law dies."[7]

[1] deplorabile excidium. [2] sequutum. [3] in alma urbe; Rome often is thus referred to. [4] operae pretium duximus; Mr. Hodell translates: "have paid down the price of toil." [5] seriem facti, the technical term for the statement or narrative of the facts of a case in chronological order. [6] applicabilia. [7] Amplified from Barbosa in the Thesaurus Locorum Communium, 6th ed., book 6, ch. 7, § 12: "quod sicut ex facto jus oritur, ita ex facto jus moritur;" also "facti narratio non facit jus, quia ex facto jus oritur." Hence it is added "that by reason of a very little change in the facts, the law is frequently entirely changed." Barbosa's collection of legal maxims, definitions, etc., amplified by later hands, is a valuable compendium with many references to legal literature.

Section 59.

[Gambi, Pam. 5, lxi, 65, § Facti ideo.]

The facts of the case therefore are as follows: Guido Franceschini of the city of Arezzo married Francesca de Comparini, to whom there had been

promised by Pietro and Violante Comparini for dowry among other things certain property which was subject to a trust.[1] The Comparini had brought up the said Francesca in their home as their own daughter, and as such they had disposed of her in marriage. And since the said Pietro and Violante had no other children, they gave up their residence in the City and betook themselves to live at the home of Franceschini, which was situated in the city of Arezzo, where for some length of time they continued to live together in peace. But as often happens among friends and relatives, disputes and quarrels arose, on account of which the said Pietro and Violante withdrew from that home and the city of Arezzo and returned to Rome.[2] In the meantime as the flame of this burning hatred increased, a suit was brought concerning the dowry that had been promised, and then repudiated by Pietro Comparini, on the pretext that Francesca was not really the daughter of the said Pietro and Violante but had been received as a substituted child[3] and brought up by them, and that for this reason the said Guido and Francesca could not look forward to the succession to the property which was the subject of the trust. And although Franceschini obtained a judgment in his favor on this point,[4] yet when an appeal had been taken in behalf of Pietro Comparini from this judgment, Francesca declared that she had been illtreated in her husband's home by him, and therefore planned[5] to leave it. Accordingly she took her flight with the assistance and in the company of the Canon Caponsacchi, who is supposed to be a connection of the said Franceschini.[6] But when Franceschini learned of his wife's escape he

followed her, and overtook her at the inn of Castelnuovo. There he applied to the Governor of that place and managed to bring about[7] the capture of both his wife and the Canon, as accordingly it followed;[8] and afterwards, his accusation having been presented, a criminal suit was instituted in this tribunal of the Governor of the City, in which the prosecution having been framed[9] and the Procurators of both sides having been heard many times, not only orally but in written arguments, it was decided on account of defect of proof of adultery, that the said Canon should be relegated to Civita Vecchia, and the said Francesca should be held in a place of safe keeping.[10] But because it was alleged on behalf of the Comparini that it was the duty of Franceschini to furnish her with maintenance in the place of safe keeping, and on behalf of Franceschini that this concerned the Comparini, the most Illustrious and most Reverend Lord Governor, having first secured the consent of Abate Paolo, the brother of the said Guido, and his attorney in fact in the case,[11] assigned the home of the Comparini[12] to Francesca as a safe and secure prison under bond with surety.

[1] Perhaps "which was subjected to a trust by Pietro and Violante as husband and wife." The bulk of the Comparini property appears to have been already subject to the fidei commissum, and it is not improbable that they agreed by the marriage contract either to add the remainder to it or to establish something similar. [2] in Urbem, *the* City. See Dig. 50, 16, 2, 1, Urbis appellatio, and Donellus 11, 1775. [3] uti partus suppositus recepta; Mr. Hodell translates: "after a pretense of her birth had been made," etc. [4] super hoc articulo favorabilem sententiam. [5] curavit recedere. [6] Caponsacchi denied this in his examination, LXXXIX, 97, and no evidence to the contrary appears. [7] curavit committi capturam. [8] prout sequuta fuit. [9] fabricato processu. [10] in conservatorio. [11] procuratoris in causa. [12] domum de Comparinis.

Section 60.

[Gambi, Pam. 5, lxii, 66, § Quibus controversiis.]

While these disputes, both in the civil and the criminal court, were pending, and also a suit that had been brought in behalf of the said Francesca, his wife, for separation of marriage,[1] the said Franceschini was plotting to take vengeance for the matters aforesaid;[2] and for the execution of his vicious purpose, he assembled[3] Domenico Gambassini of Florence, Alessandro Baldeschi of the territory of the city of Castello,[4] Francesco Pasquini Antonio of the Marquisate of Monte Acuto, and Blasio Agostinelli of the City of Populo, and a resident of the Villa Quadrata, and provided them with swords and a dagger,[5] prohibited by the Bull of Alexander VIII. In the company of the aforesaid men he entered the City, and having made his way[6] to the home of the Comparini at seven o'clock at night,[7] he procured[8] the opening of the door under the pretense that he was bringing to Violante a letter sent by the said Canon Caponsacchi, who was staying at Civita Vecchia. Accordingly as the door of the dwelling was opened by the said Violante, the aforesaid Guido and his companions immediately attacked her and cut her throat[9] with the aforesaid swords. She fell dead immediately, just as Pietro also, whose throat was likewise cut,[10] departed this life. Francesca indeed managed[8] to hide herself under a bed, but was discovered and wounded in many places. Then, by the permission of God, she did not die at once[11] — although after a few days she also passed away — so that she was able to reveal this monstrous crime. When my most Illustrious Lord the Governor of the City had notice of the affair, with most vigilant

attention he took pains[8] that the malefactors were pursued by officers[12] beyond the City, and accordingly they were found the same night in the tavern at Merluccia, with firearms and the unlawful swords still bloody. They were taken to prison, an indictment was framed[13] against them, and they were examined as to the crime. Some of them confessed it, although indeed the others denied[14] their conspiracy in the affair, and their knowledge that all the family were to be killed,[15] yet against them there result from the proceedings not only the most cogent presumptions of their knowledge and the aforesaid conspiracy, but also the weightiest proofs,[16] so that my friends the counsel for the Defense can very slightly oppose or dispute them.

[1] super separatione thori, not divorce, but separation, as we say, from bed and board. [2] de praedictis vindictam sumere; Mr. Hodell translates: "to take vengeance upon the aforesaid." [3] coadunatis; the technical word for illegal assembly. [4] For description of the Socii see Ch. XI. [5] stylus. See as to the Bull of Alexander VIII, post § Secunda qualitas, LXV, 69, Ch. X, sec. 60. [6] habito accessu. [7] hora prima noctis. See as to the hour, the Chronology in Ch. I. [8] curavit. [9] fuerit jugulata, Mr. Hodell translates: "was cut to pieces with their swords." [10] pariter jugulatus, Mr. Hodell translates: "was likewise cut down." [11] non remansit extincta; literally "did not remain dead." [12] ab exequutoribus. [13] constructo processu. [14] sint negativi super tractatu. [15] super tractatu ac scientia de occidendo omnes de familia; Mr. Hodell translates: "made denial of the management and knowledge of the killing of the entire family." [16] The distinction between praesumptio and indicium is slight; see ante Ch. IV. Indicium was used particularly of proofs, presumptions or suspicious circumstances that would justify torture.

Section 61.

[Bottini, Pam. 6, LXIX, 75, § Quoniam ut auditum.]

Since (as we have heard) the principal defense of Count Franceschini, the accused, consists in the

alleged causa honoris, by which he was led to commit the crime, it is therefore the duty of the Fisc to expose the unsubstantial nature of this defense,[1] in order that this so atrocious and monstrous crime[2] may be punished with the penalty that it deserves.

[1] huius insubsistentiam. [2] adeo atrox et enorme delictum; while these words may perhaps be used in their popular sense, they are more probably technical, enorme being equivalent to atrox. See the explanation in Ch. IV.

Section 62.

[Bottini, Pam. 6, lxix, 75, § Examinanda itaque.]

Therefore I assume that we should examine the foundations upon which the asserted causa honoris can be rested, namely, the elopement of the unfortunate wife from the home of her husband, together with Canon Caponsacchi, with whom she was arrested in the tavern at Castelnuovo, and the alleged love letters which were introduced into the prosecution concerning the said elopement and seduction,[1] from which the alleged infidelity of the wife is deduced; for all the other things heaped up in the said prosecution are absolutely trivial,[2] equivocal, or not proved; as it may also be inferred from the discharge of the wife Francesca under bond only[3] to keep her home as a prison, and of the Canon with relegation[4] for three years to Civita Vecchia, which sentences show undoubtedly that no legal proof had been obtained by the Fisc[5] in the said prosecution of her infidelity and the alleged violation of her conjugal vows with which she had been charged by the [present] defendant.

[1] fuga et deviatione, Mr. Hodell translates: "flight and departure." See the distinction noted in Ch. I. [2] laevia, for levia; Mr.

Hodell translates "stupid," as though it were laeva. [3] cum sola cautione, Mr. Hodell translates: "merely with the precaution." [4] relegatione. [5] That is, Gambi or Bottini himself, representing the Fisc in the Prosecution for Elopement.

Section 63.

[Bottini, Pam. 6, lxix, 75, § Et quidem ex.]

And indeed from the defenses then made, yes, even from the record of the prosecution[1] itself, a very just cause clearly appeared on account of which the hapless girl was led to take her flight from her husband's house, and go back to her own home, there to lead a safe and quiet life with her parents. Notorious[2] indeed are the altercations which immediately arose between the said parents of that most wretched girl, and the accused, and his mother and brothers, on account of the poverty of their household,[3] the former lamenting in vain that they had been deceived by the show of no little wealth by reason of the fictitious annual income of 1700 scudi, which was discovered to be absolutely nonexistent.[4] So true is this that while they dragged out their stay in the house of the husband, the defendant, in the city of Arezzo, they were so badly treated by him and his relations that after a few months they were forced to leave the same and return to the City, and during the entire time in which they lived together, quarrels and complaints flourished continually among them, which complaints were excited by reason of the just resentment of the Comparini at the fraud which they had suffered; as appears from the letters of the Abate Paolo Franceschini, which presuppose these troubles and were examined for the defense by the Procurator of Charity.[5] These letters show that a violent prejudice[6] had even then been

conceived against these unfortunate parents, and especially in that letter written under date of March 6, [1694] where it is said: "I write again to you that I do not wish to imitate him in his manner of writing, not being of his mind to sow broadcast in letters such words as would merit response by deeds and not by words. And these are so offensive that I have kept them for his reproof and mortification." And further on he says: "So that if you give us trouble, which I will never believe, you yourself will not be free therefrom." But sufficient proof results from the letters as the following authorities advise; Gabriel. tit. de confess. conclus. 1, n. 54; Farinac. cons. crim. 24, n. 21; Matth. Sanz. de re crim. contr. 28, n. 26 et seq. and contr. 77, n. 2; Sperrell. decis. 69, n. 4.

[1] ex processu. [2] notoriae, in its general rather than its technical sense. [3] ob rei familiaris angustiam. The familiar Horatian phrase, Mr. Hodell translates "parsimony." [4] insubsistens. [5] The Procurator of Charity (not of the Poor) represented Pompilia and Caponsacchi in the Processus Fugae, and this letter was there produced and relied on by him. See Lamparelli's argument, § Nec ad huiusmodi, CCXLV, 242, Ch. XII, sec. 4. The letter itself is not preserved in the O. Y. B. Mr. Hodell translates: "considered for the defense by the Procurator of the Poor," who was Archangeli. Of course, Archangeli would not base an argument on such a letter. [6] malum animum.

AUTHORITIES

Gabrielius, Communes Conclusiones De confessis., conclus. 1, n. 54, the rubric being "confessio facta absente parte, non operatur," does not sustain the text. He states that such confession operates only as an indicium, not even semi plena probatio. Moreover these were letters of the Abate Paolo, not by a party as in Farinacius, cons. 24, n. 21, where the letters were written and signed by the plaintiff manu propria, which was held to be plena probatio. Such was the case also in the decisions cited from Matthaeu et Sanz de re criminali, and apparently in that from Sperellus. Antonius Gabrielius (died 1555) was Dean of the Advocates of the Sacred Aula, and Advocate of the Apostolic Fisc. His work is a book of general principles, and many legal maxims are commented on in lib. VI.

Section 64.

[Bottini, Pam. 16, lxx, 76, § Et licet ipsae.]

And although the letters themselves do not disclose the nature[1] of these altercations, yet — (besides that some of them reveal[2] that the complaints had increased to such an extent that their bitterness had grown to hatred, as appears from the letter of February 12, 1694, where we read: "But hearing from the one side or other that the bitterness between them, not to say the hatred, is increasing") — it would have been easy for the accused and the Abate his brother to show that the complaints were unjust, or were occasioned by the Comparini themselves, by producing the letters written to the said Abate, as appears from the tenor of the said letter where it is said: "Because I feel that the enemy of God has put strife among them, it is proper[3] that I should fulfil my duty toward you of a reply."[4] And since they have not produced these letters the presumption lies heavily upon him who conceals them of the truth thereof, and of that cause as to which they were complaining and disputing; as in the like case was decided by the Rota in a case from Rome or Naples of "Liberatio a molestiis,"[5] February 27, 1690, § Eo magis, before his Eminence Cardinal Caccia, and in a case from Rome of "Pecuniaria exhibitio,"[6] June 21, 1694, § Clarius, before the Reverend Father in God Muto. And moreover this enumeration of instances of the very bad treatment[7] shown by him to Pompilia's parents, to whom he was bound by the dowry contract to furnish maintenance, appears from the deposition of the maid servant in the Summary, Number 1; and as this is certainly apt to excite the sympathy

of the reader, it is rendered much more credible that by this kind of bad treatment[7] the mind of the wretched wife was very greatly exasperated, for she was grieving in vain that her parents were so harassed, nay more, she had even been hindered from grieving.

[1] non parificent qualitatem; parificare, a word several times used by Bottini in the sense of regarding as equal or equivalent; here it is probably a misprint for patefaciunt. [2] ultra quod aliquae praeseferunt; Mr. Hodell translates: "yet some of them more than prove." [3] convenevole, Mr. Hodell translates "improper." [4] These letters are not included in the O. Y. B. [5] i.e., Relief from vexations, as threats of suits or threatened suits. [6] i.e., Action of accounting. Lamparelli, § Nec ad, CCXLV, cites these cases, Ch. XII, sec. 4. [7] tractatuum, tractationibus, Mr. Hodell translates: "the truth of the charge of ill treatment." The cases cited from the Rota are reported in the Decisiones Nuperrimae, the first in vol. 3, Dec. 15, and the second in vol. 4, Dec. 261.

Section 65.

[Bottini, Pam. 6, LXX, 77, § Reditus ad urbem.]

Any one may know how greatly, and with what most reasonable grief, the return to the city of her parents affected this most wretched girl, who was not more than fifteen years old. For she was in fact destitute of all assistance, and remained exposed[1] to her husband's severity by reason of which she feared that she was put[2] in daily peril of her life. In vain did she attempt a recourse to the Very Reverend Bishop and the Deputy Governor, Summary, Number 2,[3] and in vain did she attempt the intercession of certain noblemen, which before had also turned out to be useless, as appears from the said letter of March 6, where we read: "But what remedy can I give you when so many gentlemen friendly to both parties have interfered to settle the troubles and it has not turned out well?"

She might have supposed that no other remedy remained to her than to take flight from her husband's house, and to seek again her father's home.[4] And inasmuch as this was put into execution in order to escape the peril of her life, her flight can afford no proof of her dishonor, or violation of her conjugal fidelity, since it should be attributed to an entirely lawful, rather than to a criminal motive, as according to the Text in cap. In poenis, de regul. jur. in 6, is pointed out by Honded. cons. 105, n. 60, lib. 1; Cravet. cons. 8, n. 2, and cons. 319, n. 1; Andreol. contr. 66, n. 24; Mascard. de probat. conclus. 814, n. 3, vol. 2; Conciol. allegat. 87, n. 24.

[1] exposita remanebat, continually exposed. As to Pompilia's age see § Et quoniam, CLXXII, 179, post sec. 68. [2] constitutam. [3] D. Commissarius. See "attestation" of Tortelli et al, LIII, 53, and Pam. 15, CCXIII, 215. [4] domo viri * * patrios lares.

AUTHORITIES

Text in cap. In poenis is Sexti Decretal. book 5, tit 12, De regulis Juris, Reg. XLIX. "In poenis benignior est interpretatio facienda." Hondedeus, cons. 105, n. 60; where one's motive may be due to a cause that is deceitful or to that which is not deceitful, the latter will be presumed. Cravetta, cons. 8, n. 2, and cons. 319, n. 1: "quod in dubio dolus non praesumitur et potius praesumitur culpa quam dolus." Negligence is to be presumed rather than malice. Mascardus de probat. cons. 814, n. 3, concerns presumptions in cases of dower, not especially applicable. Andreolus, cont. 66, n. 24; error is to be presumed rather than fraud, etc. Conciolus, alleg. 87, n. 24; every other presumption should be adopted to avoid that of fraud or craft.

SECTION 66.

[BOTTINI, PAM. 6, LXX, 77, § URGENTE ETIAM.]

There was also another motive impelling her[1] by reason of which she desired to return to her father's home,[2] namely, that illness of which she speaks in her letter, where she mentioned[3] that she could not wait for the company of Gregorio Guillichini, and

that for this reason also she had to entrust herself to the Canon,[4] whence it can easily be inferred that she was arranging for her flight for lawful reasons.[5]

[1] Urgente causa; ablative absolute beginning the sentence. [2] patrios lares. [3] insinuavit. [4] sese circa hoc remittendo D. Canonico; "Mr. Hodell translates: "that this task had to be remitted to the Canon." [5] Mr. Hodell translates this section as though her father's illness was a reason for Pompilia's flight to Rome. There is no evidence that this was the fact, and as the letter referred to is clearly that written by Pompilia to her parents from Castelnuovo, CLV, 160, it is more natural to interpret the argument as meaning that her selection of Caponsacchi as her travelling companion was compelled by the illness of Guillichini, i.e., she had previously made her plans to go with the latter, and his illness made necessary the immediate selection of another. See Bottini's later reference in § Satius quidem, CLXXIV, 181, sec. 77, and A. K. Cook, p. 46.

Section 67.

[Bottini, Pam. 6, LXXI, 77, § Nullatenus vero.]

By no means indeed should any credence be given to the letter written by the said wife to the Abate Franceschini,[1] in which she thanks him for having married her to the accused, his brother, and acknowledges that, after the departure of her parents, she was leading an entirely peaceful life, because their evil seduction had ceased,[2] which was alienating her from her husband. She also in this letter reveals the horrible advice that had been given to her of destroying the entire household. The wife indeed[3] in her examination[4] frankly admits that she had written this letter in obedience to her husband, the accused, he marking the forms of the letters[5] over which she drew her pen, as appears from a passage in her examination[4] given in our Summary, Number 3.[5] And forsooth a mere reading of the said letter so horrifies one that it is incredible that the unfortunate girl should have been

able to write such things to the injury and slander of her own parents, unless she had been compelled to do so through fear excited[6] by her husband. For this purpose the said letter is given in the Summary, Number 4.[7]

[1] The letter of June 14, 1694, LV, 56. [2] cessante. [3] siquidem. [4] in constituto * * constituti. [5] LIV, 55. [6] metu per virum illatum, for illato. [7] LV, 56.

See as to the probability of Pompilia's statement, Lamparelli, § Nam quoad, CCLXVII, 244, Ch. XII, sec. 8; Archangeli, § Inanis est, CIV, 112, ante sec. 40; and § Nam praeterquamquod, CIV, 112, ante sec. 41.

SECTION 68.

[BOTTINI, PAM. 13, CLXXII, 179, § ET QUONIAM PRIMO.]

And since in the first place, the cause of her elopement is considered by counsel for the defense in order that he may persuade you that it was entirely unlawful, and was arranged for the greater convenience of carnal intercourse, the proofs adduced for this purpose should be critically examined, of which the principal one is drawn from the alleged letter of Francesca Pompilia, written to the Abate Franceschini, falsely accusing her parents[1] in that they were urging her to poison her husband, his brother,[2] and her mother-in-law, to burn the house down, and to go back to the City with her lover. But of this certainly there can be no better refutation than appears from the very contents of the said letter, which includes things so improbable or rather incredible that it was deservedly disregarded by my Lords the Judges.[3] For who could be found so devoid, and unmindful of filial love and respect as to persuade himself that this delicate girl (at that time not more than fourteen years of age, as appears from the certificate of her baptism,

in the Summary, Number 2,[4] married away from her father's home, and stricken with piercing grief at the departure of her parents, and very badly treated in the home of her husband, so that she was forced to have recourse not only to the ecclesiastical but also to the secular authorities), had, with a calm mind, written to her husband's brother, who was so notoriously hostile to her parents, that they had given her, not merely such wicked advice, but even commands? Unless as she frankly confesses, she had been forced by her husband to write such things, whom she could not oppose when he commanded it without the greatest peril; since this very improbability, being of itself enough to strike the reader with horror, sufficiently shows that she was not acting of her own accord but under compulsion; according to what is laid down by Farinac. cons. 22, n. 34, before the middle, book 1, and cons. 60, n. 31, at the end; Caball. resolut. crim. cas. 199, n. 36, where he says that we should not admit what no sane man would affirm;[5] Vermigl. cons. 3, n. 6 and 7, with other authorities there referred to.

[1] insimulando; "making the plausible charge against her parents that," etc. [2] Mr. Hodell translates, "her brother," but Pompilia had none. [3] Mr. Hodell translates "ut merito spreta fuerit" as "that it was rightly rejected by the Judges." This letter, LV, 56, was in evidence in the Processus Fugae, but there is nothing to show that it was rejected by the Court. [4] CLV, 159; fidem, see Glossary. Pompilia was born July 17, 1680. In § Reditus ad urbem, ante sec. 65, Bottini says Pompilia was not more than fifteen years old.

AUTHORITIES

Farinacius, cons. 22, n. 34: "therefore just as from probability there arises an indicium of guilt; so also from improbability there arises a presumption of innocence." The distinction between indicium and praesumptio has been already noted; but sometimes they were used as practical equivalents, and perhaps so here. Farinacius, cons. 60, n. 31: "and what is not naturally probable is never presumed to be the fact, although it may be possible." Caballus, cas. 199, n. 36, merely says

"that should not readily be believed by the Judge which is not probable," citing l. non est verisimile ff. quod met. causa, Dig. 4, 2, 23. The quotation "admittendum non est quod nemo sanus probaret" is in Vermigliolus, cons. 3, n. 7, with a reference to Dig. 21, 2, de Evictionibus 31, "* * quod utique nemo sanus probabit."

Bottini, in this and the following sections, is concerned only in denying the authenticity of Pompilia's letter to the Abate Paolo. He evidently disbelieved her story as to having inked over a letter previously traced for her; and practically admitted that she knew how to write in 1697, for he refers to her letter to the Comparini of May 3, 1697. See A. K. Cook's analysis of the testimony, App. IV.

Section 69.

[Bottini, Pam. 13, clxxii, 179, § Ac propterea.]

And therefore we need not consider whether the qualification added to her confession is to be thought probable, namely, that her husband had marked out the characters[1] of the said letter, and that she had traced them with ink by drawing a pen over them, because she herself did not know how to write. For perhaps she shuddered to confess that, even when driven by fear, she had written such things to the injury of her father and mother, which fear moreover is by all means to be presumed in the case of a wretched wife, of tender age, destitute of all help, away from her father's home and in her husband's house,[2] as is held by Menoch. cons. 1, n. 290, book 1; Cravett. cons. 114, n. 3, book 1; Cepol. caut. 221, n. 4 and 8; Mogolon. de metu, cap. 2, § 7, n. 15; where it is said that a presumption of fear arises from the absence of relatives; Capyc. Latr. dec. 138, n. 16 [book 2]; and especially after recourse had been had to the authorities without result. Proof to the contrary is not sufficiently deduced from the signature of Francesca Pompilia to the marriage articles, and from the letters asserted to have been written by her occasionally,[3] and sent to the Canon or thrown out of the window,

as a witness for the Fisc relates in the Prosecution for Elopement, page 108; seeing that [as to the first] the very brief signature written[4] in the marriage articles does not exhibit such skill in writing that she could have written with the same readiness such a long letter, since daily experience teaches that many are found who can with difficulty write their own names. And [in the second place] this [contrary proof] can much less be said to be shown by the alleged letters, since they were constantly[5] denied by her, nor can they be said to be sufficiently verified[6] by the assertion of the said witness for the Fisc, that Pompilia threw a note from the window, which the Canon picked up, and then went away,[7] because, beside that the witness is only a single witness,[8] and of the lowest station in life, namely, a base prostitute, and therefore an incompetent witness for convicting a prisoner[9] — as is advised by the Text in cap. Veniens [Decretal 2, tit. 20, cap. 10]; cap. Licet universis [Decretal 2, tit. 20, cap. 23] de Testib.; Farinac. de Testibus qu. 64, n. 28; Vermigl. cons. 146, n. 3; D. Canonicus Raynald. in Sintax. rer. crim. book 1, cap. 4 [1?], § 10, n. 118; — she neither affirms nor can she affirm that this is a letter written by Francesca Pompilia, just as the letters found in the prison[10] at Castelnuovo could have been written by another hand, and even assuming that[11] they had been written by her, since they are later in date, they do not prove her skill in writing at a time past, because she could have acquired this afterwards,[12] her desperation sharpening her wits, in order that she might allure the Canon to elope[13] with her, so that she might thus escape the peril of her imminent death; for in matters like these, which are subject to change and can occur subsequently,

one cannot soundly argue from the present to the past, as is held by Alciat. in tract. de praesum. reg. 3, praesumpt. 28, n. 2, vers. Et idem credo; Cravett de antiquit. temp. in last part n. 5; Menoch. de praesumpt. book 3, praesumpt. 93, n. 7; and because as a matter of fact[14] she learned to write in the City of Arezzo after the departure of her parents, as appears from her own letter written in the prison of Castelnuovo found among her private papers[15] after her death, and given in our present Summary, Number 3.[16]

[1] elementa epistolae; literally the letters of the letter. [2] extra patrios lares et in domo viri. [3] successive for subsicive; see Glossary. Mr. Hodell translates, "in succession." [4] exarata. [5] constanter, perhaps "consistently." [6] verificatae. [7] See Archangeli's argument, § Nam praeterquamquod, CIV, 112, ante sec. 41. [8] testis unicus, a single, i.e., uncorroborated witness. [9] ineptus ad convincendum; Mr. Hodell translates: "unsuited for proving a matter." [10] Said elsewhere to have been found in the latrine. § Minusque, LXXIII, 79, post sec. 78. See also § Nam praeterquamquod, CIV, 112, ante sec. 41. [11] quatenus. [12] ex post. [13] ad fugam captandum. [14] de facto. [15] inter domesticas scripturas. [16] CLV, 160.

AUTHORITIES

Menochius, cons. 1, n. 290: the presumption of fear ceases or is absent when friends are present; Cravetta, cons, 114, n. 3, likewise: the presumption of fear ceases when husband or friends are present; so Caepolla, cautela, 221, n. 8, when friends or relatives are present; such cases are the converse of that in the text. Capycius Latro, dec. 138, n. 16, book 2, not much in point. Farinacius, qu. 64, n. 28. He is properly called a single (singularis) witness who has no co-witness in his deposition; and so when any one deposes concerning that which he singly (unicus) and alone knows, and the other witness either does not know it, or if he knows does not depose in the same way, then he is properly called "testis singularis," Vermigliolus, cons. 146, n. 3. These authorities are also cited post § Levioris ponderis, LXXIV, 81, post sec. 85. Alciatus tract. de praesumpt. and Cravetta de antiquitate temporum (Part iv, n. 5) are cited by Menochius, book 3, praesumpt. 93, n. 7, to the effect that whenever the inquiry concerns a certain quality or characteristic as to which the present condition of a thing does not agree with its former condition, the past shall not be presumed from the present.

As to the place in which the letters are said to have been found, either in the latrine at the inn or in the prison, see A. K. Cook, p. 132, who argues that Pompilia and Caponsacchi could not have been so careless as to carry with them these incriminating documents. But they probably considered this safer than to leave them at Arezzo and doubtless took them away for their more certain concealment or destruction and had no time to accomplish either after their sudden apprehension.

Section 70.

[Bottini, Pam. 13, clxxiv, 180, § Verificationes quoque.]

The corroborations[1] also of the aforesaid letter, which are deduced from the letters of the Lord Governor or Deputy[2] of Arezzo, of the Very Reverend Bishop, and of Bartholomaeo Albergotti,[3] are so far from excluding the lawful reason for their elopement which was alleged by Francesca Pompilia herself and the Canon in the Prosecution for Elopement, that they rather strengthen it. For while they criticize as ill advised the recourse made by her [to them], perhaps [they did this] to relieve themselves from blame because they without foreseeing the consequences had repelled them;[4] therefore it is the more credible that the minds of her cruel husband and of her mother-in-law who was harsh and always, as experience teaches,[5] implacable, were the more exasperated by her visits. And any one would be convinced that their minds were much more irritated after the suit had been brought concerning the fictitious birth of Pompilia,[6] and the rescission of the dowry contract, and the publication of pamphlets about the poverty of their home,[7] and the very bad treatment that they experienced in Arezzo in the home of Guido and his wife; and from the suspicion that Guido and his mother entertained of her love for the Canon (although that was feigned in order to

allure him), and from this exasperation of the husband, exciting that deadly hatred which arises from a lawsuit about a thing of great value, and much more when it concerns one's whole estate, as the following observe, Grammat. cons. 46, n. 4; Cravett. cons. 75, n. 11; Decian. tract. crim. book 3, cap. 25, n. 56 and 57; Vermigliol. cons. 321, n. 5; Farinac. qu. 49, n. 2; and the dispute about the fictitious birth of Pompilia[6] should be considered as such. Certainly the just fear of the hapless wife could not be denied, concerning the peril of her life, and being driven to desperation to avoid this, she could lawfully make her escape; for if this is lawful by reason of mere blows beyond the bounds of permitted correction, as, following Ancharan. cons. 408, and Tiraquell. in leg. 1, connub. n. 24, is the opinion of Moller. de Cornut. cap. 5, n. 24, how much more should it be considered lawful when the wife was in constant fear that death by knife or by poison would be inflicted upon her? And to avoid this it was a prudent decision to leave her husband and go back to her father's home.

[1] verificationes. [2] D. Praesidis seu Commissarii. [3] Letter of the Governor, LXXXI, 89; of the Bishop, XCI, 99; of Albergotti, LIV, 55. [4] ipsos improvide (recursus) rejecerint, i.e., repelled her advances to them. Mr. Hodell translates, "turned her away." [5] Note the evil reputation of a mother-in-law, "ut experientia docet." [6] super suppositione partus; literally the substitution of a child. See § Credidit infelix, XIX, 20, Ch. IX, sec. 4. [7] angustia rei familiaris.

AUTHORITIES

Cravetta, cons. 75, n. 11: enmity is presumed from a lawsuit. Decianus, book 3, ch. 25, n. 57: a lawsuit involving one's entire property, or the greater part of it, is equivalent in this respect to a criminal suit; and this holds good not only if the case concerns the loss of goods but also if there arises a probable fear of losing life or reputation. Farinacius, qu. 49, collects numerous authorities; followed by Vermigliolus, cons. 321, n. 5; the reference to Grammaticus, cons. 46, n. 4, seems erroneous.

Tiraquellus, leg. 1, n. 24, gives the rule that a husband may chastise his wife in moderation; but if a man should whip his wife too severely and she runs away for that reason and commits adultery, he cannot prosecute her, or recover her dowry; he adds that it is not a gentlemanly thing (honestum) for a man to whip his wife. Ancharanus, cons. 408: excessive cruelty by a husband justifies the wife in leaving him.

Andreas Tiraquellus, in French, André Tiraqueau, was born in Poictiers, perhaps at Fontenay le Compte, about 1480, and died in 1558. The De Legibus Connubialibus, his most famous work, is a commentary or gloss on the customs of Poitou, and a repository of curious information concerning the sex, with illustrations from authors of all ages. Tiraqueau was counsellor of the Parlement of Paris, a very distinguished lawyer, and a warm friend of Rabelais; see W. F. Smith in his Rabelais and His Writings. I am not convinced that Mr. Smith is right in holding Tiraquellus responsible for much of the coarseness of Rabelais.

Section 71.

[Bottini, Pam. 6, lxxi, 78, § Justior etiam.]

An even more reasonable fear, on account of which the hapless girl was led to take her flight, proceeded from the lawsuit brought by her father against the accused regarding the nullity of the dowry agreement, as having been made upon a false inducement; because [Pietro] believed that he was promising this dowry to his daughter, and had learned that she was not such from the disclosure made by her [supposed] mother, that she had substituted a baby[1] to deceive her husband, and to defeat his creditors. For since he had assigned all of his property as dowry (and indeed it was of considerable value, having regard to the social position of the parties),[2] the controversy raised about the property by the father-in-law, being certainly very serious, we may suspect a deadly hatred to have arisen, by which the conjugal peace, long since disturbed by their preceding quarrels, was entirely destroyed[3] as their hatreds grew afresh. For daily experience teaches us that lawsuits involving a considerable sum of money

produce this effect, and much more when they involve one's whole estate, and this is asserted by Grammaticus, cons. 46, n. 4; Cravett. cons. 75, n. 11; Soccin. Jun. cons 73, n. 14, vol. 2; Decian. tract. criminal. lib. 3, cap. 25, n. 56 and 57; Vermigliol. cons. 231, n. 5; Farinac. qu. 49, n. 2.

[1] partum supposuisset, see note § Credidit infelix, XIX, 20, Ch. IX, sec. 4. [2] inspecta qualitate personarum. [3] eliminata remaneret.

AUTHORITIES

These are cited in the preceding section, § Verificationes, except Socinus Jun., vol. 2, cons. 73, n. 14, who speaks of the deadly hatred arising from a lawsuit that involves either the whole or the major part of one's property. In what way the "child substitution" would defeat Pietro's creditors does not appear.

There were three Socini: Marianus (1401-1467), a Decretalist, and friend of Aeneas Sylvius (Pope Pius II); Bartholomaeus, son of Marianus (b. 1436 or 1437, d. 1507), whose descendants, Lelius and Faustus, gave their name to the Socinian sect. Panzirolus relates an anecdote of a public disputation between Bartholomaeus and the celebrated Jason de Mayno. The latter, being hard pressed, cited an authority that existed only in his imagination. Socinus countered with another directly opposite. "Where," said Jason, "did you find that law?" To whom Socinus replied, "Just after the one you just now cited." Lorenzo Medici, before whom the incident occurred, was much amused. Marianus Junior (b. 1482, d. 1556) was a nephew of Bartholomaeus and professor in several cities, including Bologna, where he compiled his Consilia. All three were celebrated jurists and exerted great authority by their writings.

SECTION 72.

[BOTTINI, PAM. 6, LXXI, 78, § ADEOQUE CUM.]

And indeed since reasonable fear should be considered, and the qualifying circumstances of the persons[1] and the time weighed by a prudent judge, — as, in accordance with the Text in l. metus autem causa ff. ex quibus caus. major. [Dig. 4, 6, 3]; Gloss, in cap. Pen. de his, quae cui metusve Caus. [Decretal 2, tit. 40. de his quae vi metusve causa fiunt. chap. 6]; is advised by Paris. consil. 53, n. 60, lib. 4; Menoch. de arbitr. cas. 135,

n. 2; Mascard. de probat. conclus. 1051, n. 21; Cartar. decis. Criminal. 72, n. 75, and best of all Mogolon. de metu, cap. 2, § 7, n. 1 and cap. 7, n. 1, vers. Tum quia; — it may be positively affirmed in our case that the circumstances should be reckoned to be such that not only a girl of tender age (such as was this hapless wife, destitute of all assistance, and exposed to the severity of her husband, who had attacked her with a pistol,[2] threatening her with death upon the slightest suspicion), but even the most steadfast woman would mistrust that she was put[3] in constant peril of her life, and would recognize the necessity of taking precautions for her safety, which would suffice to excuse her, even if the cause, whatever it was, were [merely] imagined; as, according to the Text in l. habitatores, § final ff. locat. [Dig. 49, 2, 27] is affirmed by Mogolon. de metu, cap. 7, n. 1; Farinac. qu. 125, n. 63 and 64; D. Canon. Raynald. in sintax. rer. crimin. tom. 3, cap 25, § 4, n. 34, where he says that it is enough to see the signs and actions of a manifest intention or preparations therefor. How much more excusable[4] and worthy of sympathy should she be considered, when a cause so urgent and thoroughly corroborated[5] occurred, by which she was led to make her escape, as Mogolon. observes, tit. 2, § 6, where he holds that the mere sight of arms although their possessor does not use or even unsheathe them, is a just cause to produce fear.[6]

[1] circumstantiis personarum. [2] igneo breviori sclopulo. Cf. Lamparelli's argument, Verum etiam, CCXLVI, 243, Ch. XII, sec. 5. [3] in continuo discrimine constitutam. [4] excusabilis. [5] undique verificata. [6] metus productiva.

AUTHORITIES

Parisius, book 4, cons. 53, n. 60; what constitutes just fear is left to the sound discretion of the judge (sano arbitrio). Chartarius, dec. 72,

n. 75, and Menochius de Arbitr. cas. 135, n. 2, to same effect. Menochius says it is determined according to the quality or characteristics of the persons, sex, and age, and of the thing apprehended.

Farinacius, qu. 125, n. 63, mentions several cases, one from Jac. de Graffiis's Golden Decisions, where a woman lying in bed with her husband, and suspecting that he had hidden a sword under the pillow, with which he intended to cut her throat while she was asleep, seized it secretly and killed him with it. And in n. 195 Farinacius says one may kill a thief before the act, as while he is breaking through the wall or placing a ladder underneath the windows.

Section 73.

[Bottini, Pam. 6, lxxii, 78, § Nec inhonestatis.]

Nor can[1] a presumption of her dishonor and the violation of her conjugal fidelity arise from the company of Canon Caponsacchi with whom she took her flight, on account of which he was sentenced to three years relegation to Civita Vecchia. For, since, as has been said, the hapless girl was destitute of any assistance, the conventions[2] applicable to her special age, her sex, and station in life, did not admit of her undertaking so perilous a journey, either alone or in the company of some ordinary maid servant, lest in escaping dangers at home, she should incautiously expose herself to more serious perils, as might have happened, if while alone she had been overtaken by her husband on her journey. Nor could she find any other safer companion than this very Canon who was bound by friendship to the Canon Conti. And the latter (although he was an intimate friend of the accused, and connected with him by blood) regarded[3] her condition with great sympathy, and thought it would be safer for her to take her flight with Caponsacchi,[4] whom he judged to be a cautious man and well qualified to carry the plan[5] through to the desired conclusion, which otherwise she would accomplish with greater

risk. Therefore this necessity, and the prudent choice of the lesser evil, excludes all suspicion of the alleged infidelity [of Pompilia], as is held by Bald. in l. filium, n. 1, ff. de his qui sunt sui vel alien. jur. [Dig. 1, 6, 6], and in l. 1, n. 35, C. de iis qui accus. non poss. [Codex 9, 1]; Menoch. praesump. lib. 6, praesumpt. 54, n. 22 and 23; de Arbitr. lib. 2 [1], cas. 89, n. 23.

[1] valet. [2] propriae aetatis ratio. [3] eius statum prosequebatur. [4] cum eo. [5] aptum ad illam [fugam] ad optatum esitum [exitum] perducendam.

AUTHORITIES

Menochius, book 6, Praesumpt. 54, n. 22, relates to the presumption of legitimacy in favor of the innocent offspring, and adds generally that where two inferences may arise concerning an act, that should be preferred which does not involve guilt or crime, citing Baldus, Commentaria. Menochius de Arbitrariis I, cas. 89, n. 23, to same effect.

SECTION 74.

[BOTTINI, PAM. 6, LXXIV, 81, § ACCEDENTE INSUPER.]

There may be added[1] still further, the participation of Canon Conti, a nobleman and a connection of the accused, who promoted this plan.[2] It is incredible that he would have been willing to plot against Guido's honor, but he wished merely because of pity to rescue the hapless girl from imminent danger of death. Such participation moreover clearly appears from the letters themselves, which are alleged to have been written by him.[3]

[1] accedente participatione. [2] tractatum; often used in sense of plot or conspiracy. [3] ab illo. This should mean Conti, but no letter from Conti appears in the O. Y. B. Perhaps Caponsacchi's letter is intended, XCVIII, 105; or the reading should be ab illa, referring to Pompilia and her letter to Caponsacchi, XCVI, 103.

Section 75.

[Bottini, Pam. 14, cxcv, 199, § In facto siquidem.]

[The defense fails] in fact;[1] since indeed the proof of the alleged adultery is utterly wanting, as appears from the matters fully demonstrated in my other argument,[2] in which I have refuted, one by one, the presumptions of adultery, or rather suspicions thereof, resulting from the prosecution, to which counsel for the defendant refers,[3] by showing that the flight which the wife undertook in the company of Canon Caponsacchi, her alleged lover, proceeded from a legitimate reason, namely, the imminent danger of her life, of which she was afraid, and not from the unlawful incitement of lust. And the participation and complicity of the Canon Conti and Signor Gregorio Guillichini (a connection of the accused) in promoting the same ought certainly to be persuasive[4] of this. For they surely would not have taken this on themselves if she had determined upon[5] the evil purpose of violating her conjugal fidelity — to their own disgrace also — but, because they well recognized the necessity of the remedy, and that was to be free from danger (as a witness for the Fisc in the said prosecution concerning the elopement swore that he had heard from Gregorio), they also added their assistance to her for carrying out the execution of the plan.[6]

[1] In facto; in § Praecipuum immediately preceding, Bottini claims that the defense fails both in fact and in law. He reviews the facts in this and the following sections to § In Jure quoque, cxcviii, 201, Ch. VIII, sec. 85, with which this corresponds. [2] in Pamphlet 6. [3] ad quem relative se habet D. meus; Mr. Hodell translates: "to which his Honour attaches himself." Dominus meus is, as we would say politely, "my friend on the other side." [4] suadere debet. [5] si malum finem cessisset; the expression is not clear. It is almost like "had gone the limit."

Mr. Hodell translates: "if she were running away for the evil purpose." I suspect a misprint. [6] ad executionem perducenda[m]. This section is a good example of Bottini's involved style.

Section 76.

[Bottini, Pam. 6, lxxii, 79, § Eaque ulterius.]

This suspicion is further excluded[1] by the manner in which their elopement was put into execution, namely, in taking their journey to the City by the direct road,[2] and with the utmost celerity. For if the hapless girl had taken flight for the sake of satisfying her desire with her lover, the said Canon, (as was elsewhere charged against her and is now repeated with perhaps even more prejudice[3] in order to maintain the plea[4] of honoris causa), either she would have delayed for a time in some place away from the public road, where she could not be apprehended by the accused, or she would not have approached the City with such great speed; [she would not have acted as she did] unless indeed she had executed her plan in order to seek again her father's home,[5] in which she was hoping to attain the safety of her life and honor. Entirely too imprudent indeed would have been the plan of a lover to take a wife away from her husband's house[6] to a place where he would not be able to satisfy his desire; which improbability[7] alone would be sufficient to prove the truth of the cause alleged by the wife in her examination,[8] that she made her escape to avoid the deadly peril in which she feared she was placed,[8] and that she might betake herself to her father's home,[5] while the Canon gave her his aid and companionship out of pure sympathy, and her honor was absolutely inviolate; since indeed probability[7] is always principally to be regarded in attempting to prove crime or to refute

it, as is held by Farinac. de fals. & simul. qu. 153, n. 176, et seq. and cons. 60, n. 28 and 31; Caball. resol. crimin. in cas. 199, n. 35; Conciol. resol. crim. 27, n. 2, et seq; Vermigliol. cons. 31, n. 5 and cons. 266, n. 10.

[1] exclusa remanet. [2] recto tramite. [3] animosius, perhaps "more zealously." [4] ad affectandum; affectare may mean to make pretense of, or feign. [5] patrios lares. [6] a domo viri. [7] inverisimilitudo, verisimilitudo. [8] in constitutis: in her examination; in quo se constitutam timebat: in which she feared she was placed. See § Minusque, LXXIII, 79, sec. 78, n. 1, per inquisitum constitutum, constructed or built upon.

AUTHORITIES

Farinacius, qu. 153, n. 176, etc. These sections and cons. 60, n. 28 and 31, relate to the presumptions of the forgery or authenticity of a writing and similar cases. Caballus, cas. 199, n. 35; a case on the presumption of innocence of one who passed counterfeit money. Conciolus, the reference should be Confessio, Resol. 17, n. 2, merely states as a general principle that what is not probable bears the stamp of falsity (quod non est verisimile falsitatis habet imaginem). Vermigliolus, cons. 31, n. 5, a case of mandate for homicide; cons. 266, n.10, a case of theft.

SECTION 77.

[BOTTINI, PAM. 13, CLXXIV, 181, § SATIUS QUIDEM.]

It would indeed have been preferable if she had sought her safety by having recourse to the Very Reverend Bishop, so that he might place her in some monastery, or in the home of a respectable matron; or to the Deputy Governor,[1] who would have consulted her safety and the honor of her husband's family; or if she had at least made her escape in the company of some member of her family.[2] But, beside that the fear of imminent danger did not permit her to take better counsel (and especially in the case of a most wretched woman of tender age and destitute of all assistance, and exposed to the rage of her husband and her mother-in-law), she might [in addition] fear that fresh recourse by her would be made in vain, since

she had already found the former attempts to be useless; nor was she able to find another more suitable way to make her escape in safety — in which [escape] she considered there remained to her the only remedy — than by availing herself of the help and company of the Canon, who had been proposed to her for this purpose, by Canon Conti and Signor Gregorio Guillichini, connections by marriage of her husband. And it is incredible that they "conspired for the destruction of Guido's honor"[3] without the greatest and most urgent reason, and confidence in the Canon's honor and discretion; for one of them, namely Gregorio, had offered himself as a companion for the journey, and he would also have fulfilled his offer if his illness had permitted it, as we read in the said letter of Francesca Pompilia, found after her death and shown in our present Summary, Number 3,[4] which refers to the same reasons, the illness of Gregorio and her imminent peril, which did not permit her to wait for his recovery. And therefore since she was compelled by necessity to escape in the company of the Canon (a man whose discretion was well known to her, as likewise appears from her other letter in the Summary offered on the other side, Number 7, Letter 12,[5] in which she calls him "Chaste Joseph," and from another in which she commends his modesty[6]), she should be excused if by force of necessity she selected this remedy; according to the well-known proverb that "necessity knows no law,"[7] as to which see Ancharan. cons. 191, n. 4 and 5, and cons. 243, n. 4; Cephal. cons. 451, n. 283; Gaill. observ. book 1, observ. 102, n. 8; Cevall. com. contr. comm., book 4, last quaest., n. 50; Bellett. disquis. Cleric., part 1, § 4, n. 55 [57]; Tiraquell. de poen. temp. caus. 33, n. 3.

[1] commissarium. [2] cujusdam attinentis. [3] That is, it is incredible that they would have done what on the theory of the other side would amount to a conspiracy against Guido's honor, unless, etc. [4] CLV, 160. See as to Gregorio's illness, § Urgente etiam, LXX, 77, ante sec. 66. [5] XCVI, 104. Pompilia's comparison of Caponsacchi with the chaste Joseph is unfortunate if she thereby assumed the role of Zuleika. [6] Probably No. 4, CLVI, 160. Bottini quotes from Pompilia's "forged letters" when he thinks they help his case, thus admitting that Pompilia wrote them. [7] necessitas legem non patitur.

AUTHORITIES

Ancharanus, cons. 191, n. 4, an erroneous reference. Cons. 243, n. 4, is an opinion in answer to the question by the Sovereign whether a decree would be lawful authorizing Jews to sue in the civil courts to compel the payment of interest due them. Ancharanus replies that the decree would be justified by the public benefit since otherwise the people could not obtain money as they needed it through loans; adding that on account of necessity many things prohibited by the Divine law are conceded by the laws of man. Cephalus, cons. 451, Syllabus n. 284, "necessitatis causa, quod non est licitum, permittitur." Gaill. Pract. Observ., book 1, obs. 102, n. 8, relates to the irregular examination of infirm or going witnesses. The ordinary rules are departed from when there is danger in delay and the exigencies of time and place afford no sufficient opportunity for advisement, as necessity knows no law. Bellettus Disquisitio Clericalis De Discep. Clerical. § 4, n. 57, the general principle applied to an entirely different case. Tiraquellus de Poenis, caus. 33, n. 3, simply repeats the common proverb.

SECTION 78.

[BOTTINI, PAM. 6, LXXIII, 79, § MINUSQUE SUBSISTIT.]

And less firmly established is the other basis for the asserted plea of causa honoris, which has elsewhere been constructed[1] by the accused upon the alleged love letters, that were alleged to have been written by this most wretched girl to the Canon, also upon some written by him, which letters had been found in the latrine of the Inn[2] at Castelnuovo, where they were asserted to have been thrown in order to hide them. Besides the answers indeed then[3] given by the Procurator of

Charity[4] that the identity of the handwriting was unproved, and [also] uncertain, since it did not appear to whom they were directed, which defenses perhaps were admitted [as valid][5] since no punishment was imposed on the girl and she was simply discharged under bond[6] to keep her home as a prison, — [besides this answer I say that] although upon an examination of their contents[7] they may seem to indicate a meaning of too great friendship, yet this might have been feigned by her in order to attract the Canon, who was reluctant (as she herself confesses in her examination)[8] to afford her his aid in the execution of her premeditated flight, by accompanying her to the City, for it is evident that the letters had been written[9] for that purpose, Summary, Number 5.[10] And indeed this most wretched girl, destitute of all aid and placed in peril of her life, should be considered worthy of pity if she endeavored to attract the Canon with words that are alluring and perhaps amorous, because she believed him to be a suitable person to help her. Nor can a stronger argument for the violation of her chastity be drawn from the said letters, which were written for the purpose of the elopement, than from the elopement itself; nor is it a new thing for the most virtuous women to use similar acts sometimes for a lawful purpose, as in the sacred pages we read that Judith did to beguile Holofernes,[11] that she might free her country. This hapless girl therefore could do this thing without any stigma of dishonor, in order that she might escape the danger of death.

[1] constitutum. Below, in suo constituto, in her examination. [2] In other places said to have been found in the prison. § Ac propterea, CLXXII, 179, ante sec. 69. [3] tunc, that is, in the Processus Fugae. [4] Lamparelli, of course, is intended. Mr. Hodell translates: Procurator of the Poor. [5] Mr. Hodell translates:

"And these responses were indeed admitted." [6] Mr. Hodell translates "cum cautione" as "with the precaution." [7] inspecto eorum tenore; eorum for earum. [8] Probably in LXXXV, 93, D. [9] exaratas, Mr. Hodell translates "prepared." [10] Perhaps Caponsacchi's examination, LXXXVIII, 95. [11] The Judith argument is answered by Archangeli, Pam. 8, CVIII, 116, § Patet igitur, ante sec. 43.

SECTION 79.

[BOTTINI, PAM. 6, LXXIII, 80, § ACCEDENTE PRAESERTIM.]

There may be added[1] especially the confidence, which she had both in her own self-restraint, and in the integrity of the Canon, of which a witness in the said proceedings on examination by the Fisc at the instance of the accused who was then the prosecutor,[2] testified that he had heard[3] from Gregorio Guillichini, who is likewise a relative of the accused (as I am given to understand), as follows: "Signor Gregorio then added that the Canon was going there for a good reason and that therefore Signora Francesca had desired to go to Rome. And he told me also that no ill could arise from it because there was not the slightest sin between them." That the deposition of this witness affords full proof[4] against the party who produced him is shown by: Farinac. cons. 120, n. 10; Vermigl. cons. 500, n. 3; D. Canon Raynald. tom. 2, cap. 23, § 4, n. 26, fol. 112. And therefore since the hapless girl can be suspected of no evil by reason of the companionship of the said Canon, and since she had no other more suitable recourse for carrying out her resolution, the arrangement[5] which she made with him by means of the letters ought to be excused, as being intended for this end, although some amorous words may be read in them, which should rather be considered as

courteous and suitable for winning his goodwill; and words should always be interpreted according to the intention of the one who utters them, as according to the Text in cap. Intelligentia, et cap. Propterea de verbor. sig.[6] is advised by Surd. cons. 431, n. 35, with other authorities mentioned by Molin. de rit. nupt. lib. 3, qu. 85, n. 50.

[1] accedente confidentia; Bottini, as elsewhere, begins the sentence with the ablative absolute. [2] aderentis for adhaerentis; Mr. Hodell translates: "at the instance of Count Guido who was present." [3] testis de auditu a Gregorio. [4] plena probatio in technical legal phrase was absolute proof. [5] tractatus. [6] The reference is not to the title of the Digest, 50, 16, de verborum significatione, but to the Canon law, Decretal 5, tit. 40, de verborum significatione, cap. 6: "Intelligentia dictorum ex causis est assumenda dicendi, quia non sermoni res, sed rei est sermo subjectus;" cap. 8: "Propterea * * dum proprietas verborum attenditur, sensus veritatis amittitur."

AUTHORITIES

Farinacius, cons. 120, n. 10, a prosecution against one having discharged an arquebus at the police officers (birruarios). A witness for the prosecution testified adversely as to the shooting, which Farinacius argued, although it was the testimony of a single witness, made "full proof" against the prosecution. Vermigliolus, cons. 500, n. 3, is a similar case; he relies on Farinacius. Raynaldus, cap. 23, § 4, n. 26, a misleading reference to the Observationes, after Suppletio V, ad cap. 23, a case of dower in a forced marriage. The testimony of a single witness produced by the complainant was argued to be "full proof" against him. The cases in Surdus, cons. 431, n. 35, and Molinus de Ritu Nupt., book 3, qu. 85, n. 50, concern the construction of contracts; in the latter, marriage articles; cited § Urgente praesertim CLXXVI, 182, post sec. 82. Surdus says, "the words of the said renunciation should be understood according to the intention of Jacobus who made it."

Francis Molinus was a professor of law at Lerida in Catalonia, and Counsellor of the Royal Senate of Majorca. His tractatus de Ritu Nuptiarum was published posthumously in 1617.

SECTION 80.

[BOTTINI, PAM. 13, CLXXV, 182, § DESUMENDA PROPTEREA.]

A reason for an unlawful flight due to any dishonorable love with which Francesca Pompilia

was pursuing the Canon, is not to be deduced from her letters, because although they seem amorous, yet inasmuch as they were designed to attract the said Canon, so that he should take flight with her (which she knew she could not without him either accomplish or even attempt), these letters can afford no proof[1] of adultery having taken place. For although this proof may result from amorous letters, according to the authorities cited by counsel for the defense in § His praehabitis,[2] yet it is utterly destroyed,[3] if the letters are directed to a lawful end, such as was this flight, for the purpose of avoiding deadly peril. For then, just as the end is permitted, so the means[4] should be adjudged lawful, although they are not free from suspicion, because they are considered not by themselves alone, but in relation to their end,[5] as is held by Gratian. discept. for. cap. 580, n. 8; Gob. cons. 119, n. 72. And besides, the presumption of adultery inferred from amorous letters is not to this extent a violent one, unless they involve by inference a confession that intercourse had taken place,[6] as in explaining the authorities who assert the contrary, is held by Sanch. de matrim. book 10, tit. de divort. discurs. [disputatio] 12, qu. 3, n. 48; cited by Moller. de Cornut. cap. 7, n. 24.

[1] indicium. [2] CIX, 118, ante sec. 46. [3] elisum remanet. [4] media. [5] Compare with Guido's main argument. [6] nisi sequutae fornicationis implicitam confessionem involvant; Mr. Hodell translates: "unless they include the implicit confession of subsequent fornication." The letters could not contain a confession of something subsequent.

AUTHORITIES

Gratianus Discept. Forens. ch. 580, n. 8, "permisso fine, videntur etiam concessa media," applied, however, to a different case apparently holding that a power of sale includes (though not in the case of a feudum)

the power to pledge; the greater including the less. Gobius consult. 119, n. 72; principle applied to an entirely different case.

Sanchez de Matrimonio supports the text, and adds that even if the woman in her letters confesses her adultery, it is not full proof as the confession is extra-judicial, but it affords an indicium for torture. Thomas Sanchez (1551-1610), a learned Jesuit of Cordova, was a very celebrated authority. This work on Marriage is probably the best known treatise of its kind, and is extremely (and unnecessarily) minute in its treatment of the subject. Schulte in his Geschicte notes twenty-three editions of it, one as late as 1737. His Consilia were posthumously published.

Section 81.

[Bottini, Pam. 13, clxxvii, 184, § Zelotipia in aliquibus.]

The jealousy[1] displayed in some of the letters is indeed a sign of love, according to that verse of the poet, "Love is a thing filled with anxious fear;"[2] but whenever,[3] as has been said, love has been feigned for a lawful purpose, a simulation of jealousy could also be mingled with the pretense of love as tending to the same purpose, that of enticing his goodwill,[4] so that having obtained his promise she might escape.[5] Therefore from this simulated love, and the fictitious signs thereof, it cannot be argued that their simultaneous[6] departure from her husband's home, and their association through a long journey established proof of the alleged adultery, since even in case of the existence[7] of true and mutual love, continence has been preserved, which certainly is more difficult.

[1] Zelotipia, Mr. Hodell translates "ardour." See Archangeli's argument to which this is a reply, § Accedit quod, cx, 119, ante sec. 14. [2] Ovid, Heroides, I, 12. Res est solliciti plena timoris amor. [3] quoties. [4] ad finem captandae benevolentiae. [5] Perhaps: "so that she might attain her wish and escape," uti voti compos evaderet; Mr. Hodell translates: "so that possessed of his true service she might escape." [6] simultaneus. [7] in casu intercedentis amoris.

Section 82.

[Bottini, Pam. 13, clxxvi 182, § Urgente praesertim.]

A consideration of the following is especially cogent in proving this, viz.: that the hapless girl supposed the Canon would conduct himself with discretion[1] on the journey, since in one of her letters she does not fail to rebuke him (after having in others commended him for his discretion and purity) because he had sent to her indecent verses; Present Summary, Number 4,[2] where she says: "I am surprised that you, who are so chaste, have composed and copied matters so immodest;" and further on: "I do not want you to do in everything as you have done in these books; the first of them was so very nice, but these other octaves are quite the contrary. I cannot believe that you who were so honorable, would become so bold." Certainly from this sincere rebuke, it is evident with what purpose these letters were written, although they contain alluring words and expressions of love, since she was shocked even by the indecent verses sent to her. Therefore the letters should be understood according to the intention of the writer, just as words are taken according to the intention of the speaker; as, from a consideration of the Text in cap. Intelligentia [Decretal 5, tit. 40, ch. 6] and cap. Praeterea [Decretal 5, tit. 40, ch. 8] de verb. signific., is pointed out by Oldrad. cons. 9, n. 3; Surd. cons. 431, n. 35; Molin. de rit. nupt. book 3, qu. 85, n. 50.

[1] modesto. [2] clvi, 160.

Authorities

Practically the same as in § Accedente, lxxiii, 80, ante sec. 79. The citation from Oldradus de Ponte, cons. 9, n. 2, refers to the construction of a statute.

Bottini in this and other sections evidently believed that the love letters were authentic. He argues that Pompilia's reproof of the Canon for his indecent verses shows her own purity, but what do they show as to him? And what foundation does his indecency afford for her confidence in his character? See § Nullumque fomentum, CLXXIX, 185, post sec. 94.

Section 83.

[Bottini, Pam. 13, CLXXVI, 183, § Levis propterea.]

Should it not therefore be considered a trivial and improbable rashness of belief[1] that the hapless wife should in her journey have uprooted[2] her matronly modesty, when she had enough to do in her very rapid flight to provide for her own safety? or that her modesty was assailed by the Canon? since any love that existed[3] between them is proved only[4] by the said letters which were designed for the flight, and which exhibit solicitude for his discretion and self-control, since she so greatly complained of the mere sending of the verses, fearing lest he might become bold, as appears from the extract[5] of the letter referred to. Nor are there wanting examples of continence observed in a longer and more convenient journey undertaken and completed by lovers, although they might lawfully have yielded to the incitements of love. Hence it is not improbable that the wretched wife kept herself religiously within bounds, having been placed[6] in peril of her life, which she was expecting to escape by her precipitate flight.

[1] Levis et inprobabilis existimanda non est credulitas quod, etc.; a peculiar construction. [2] apparently eruaverit, as though for eruerit; first conjugation for third? [3] inter ipsos intercedens. [4] unice. [5] particula. [6] constitutam.

Section 84.

[Bottini, Pam. 13, clxxvii, 183, § Longe debiliores.]

Far weaker are the other presumptions of the alleged adultery, and they were therefore justly disregarded in the judge's report of the case,[1] not only in that concerning the flight, but also in that regarding the decree for torture;[2] for mutual love between her and the Canon cannot be said to be sufficiently proved from the aforesaid letters, seeing that they were related to the flight which she had previously arranged for.

[1] in relatione causae. [2] It will be observed that the Processus Fugae, and the trial for homicide are regarded as so intimately connected as to be virtually one.

Section 85.

[Bottini, Pam. 6, lxxiv, 81, § Levioris ponderis.]

Of lighter weight are the other presumptions of the alleged infidelity picked out by the defense from [first] the visits of the Canon to the home of the accused in the night time, for the purpose of speaking with the wife who was killed; [secondly] their affectionate kissing[2] on the journey, of which Francesco Giovanni Rossi,[3] the driver of the carriage, commonly called a Calesse, deposes; and [third] their alleged sleeping together in the same bed at the Inn of Castelnuovo. In respect of the first of these things, beside that the proof is indeed defective, seeing that it depends upon[4] the word of a single witness, Maria Margherita Contenti, who is subject to the most relevant[5] objection of being a public prostitute; and as a single witness she can prove nothing.[6] This is shown with respect to

her status as a prostitute by the Text. in l. 2 [3], § lege Julia, and the Gloss on the word palam ff. de testibus [Dig. 22, 5, 3, 5]; Marsil. cons. 102, n. 9; Vermigliol. cons. 408, n. 1; Crot. de Test. part 3, n. 46; Paris. cons. 67, n. 80, lib. 3; Mascard. de probationibus, conclus. 1362 [1363], n. 20.

And in respect to proof by a single witness:[7] Textus in cap. Veniens [Decretal 2, tit. 20, cap. 10], and cap. Licet universis de Test. [Decretal 2, tit. 20, cap. 23]; Farinac. de Test. qu. 64, n. 28 and 33; Vermigliol. cons. 146, n. 3; D. Canonicus Raynaldus in Sintass [Syntax] rer. crim. tom. 1, cap. 1 [4?], 10, n. 118.

[Besides these answers] since such visits were planned for the lawful end of extricating the wretched girl from the imminent danger of death by taking her to her father's home, they are not to be dragged into a presumption of illicit intercourse, since the mere possibility [that this was not so] is sufficient for this result that they should be assumed to be for a good intent,[8] as according to the Text. in l. merito ff. pro soc. [Dig. 22, 2, 51] is held by Menoch. cons. 84, n. 75; Surd. dec. 58, n. 4; Vermigliol. cons. 171, n. 27, and cons. 397, n. 11; Rota decis. 106, par. 2 divers.

[1] indicia, not proof. [2] deosculatio. [3] Francesco Giovanni Rossi (de Rubris); in Caponsacchi's examination. LXXXIX, 97, the name of the driver is given as Venarino. [4] resultat. [5] relevantissimam. [6] Mr. Hodell translates: "she endures the most relevant exception of being a public harlot, and so she alone can prove nothing." The two objections are quite distinct, one being to the competency of the witness, the other to the insufficiency of a single witness. [7] unicitatis. [8] in bonam partem sumendus; i.e., should be taken in good part.

AUTHORITIES

de Marsiliis, cons. 102, n. 9, and Crotus de Testibus, in collection of Zilettus, par. 3, n. 72, give the general rule. Crotus: "quod meretrix in causa criminali non poterit esse testis." Vermigliolus, cons. 408, n. 1,

also states the established rule. Parisius, book 3, cons. 67, n. 80; both disqualifications existed: "depositio etiam illius Mariae rejicienda est, tum quia singularis, tum quia meretrix." Mascardus de probat. conclus. 1363, n. 2: "colligitur meretrices non esse idoneas ad testificandum, tanquam infames."

As to a single witness, the Texts from the Decretals are the usual authorities. The others are referred to in § Ac propterea, CLXXII, 179, ante sec. 69.

As to the presumption of innocence. Surdus, dec. 58, n. 4; merely that a statement under oath should be given an interpretation that will avoid perjury. Vermigliolus, cons. 171, n. 27; presumption of innocence in doubtful cases. So Rota decis. divers. p. 2, dec. 106, n. 7, takes the cases from Vermigliolus.

SECTION 86.

[BOTTINI, PAM. 6, LXXIV, 81, § MAXIME CUM IPSE.]

This is especially so, since the very witness, who testifies to Caponsacchi's visits [to Guido's house], relates having heard from the said Gregorio Guillichini that it was for a good end, and that there was nothing wrong going on[1] between the Canon and the woman who has been killed; and as this man was better informed, seeing that he was a friend and blood relative of the accused (as I am instructed), he excludes every suspicion to the contrary.[2] And with this deposition, another seems to harmonize, that of the Canon Franceschini himself, a brother of the accused, who when asked whether he knew that any familiarity existed[1] between the Canon Caponsacchi and Guido's wife, answered: "This we never knew of beforehand, but after the criminal flight, the whole town said that there must surely have passed some correspondence between them." And this ignorance absolutely excludes and renders improbable any secret and unlawful visits by the Canon to Guido's house. For since the accused had threatened to kill his wife by reason of the unjust suspicion which he had

conceived of Caponsacchi, we may believe that not only he, but his brother and all the servants,[3] would have kept anxious watch over her custody, so that any such visit by Caponsacchi would have been noticed by them if in fact (as is represented) it had frequently occurred, and was intended for an evil purpose.

[1] intercedebat * * intercederet. [2] Note the hearsay character of this peculiar testimony, which seems ludicrous to a common-law lawyer. Cf. § Accedente praesertim, LXXIII, 80, ante sec. 79. [3] domestici; perhaps "the whole household."

The Canon Girolamo Franceschini, Guido's brother, appears to have lived with him.

Section 87.

[Bottini, Pam. 13, clxxvii, 183, § Ingressus et egressus.]

The Canon's going into and out of the home of Francesca in the night time were proved by a single witness of the lowest character, nor is such a thing to be presumed for an evil purpose, since it was intended to be in preparation for the flight. For whenever we have a lawful cause clearly appearing to which the purpose can be referred, it should not be attributed to an unlawful and criminal cause; as according to the Text in leg. merito pro soc. [Dig. 17, 2, 51] is held in terms by Cravett. cons. 205, n. 7 and 8.

Authorities

Cravetta, cons. 205. This case is not clearly stated, but it appears to involve a claim that a widow who lived with her husband's relatives lost her dower by leaving her home at night, which it was urged indicated an unlawful purpose. Cravetta argued that she was not bound to live there, and as she took her maid and her goods with her in a wagon, this indicated merely a purpose to change her residence; "in a doubtful case that interpretation should be adopted by which a penalty is avoided and crime excluded." This consilium is cited post § Ne applicantur,

sec. 90, § Augeturque, sec. 93, and § Condormitio, sec. 95; it is quite different from Pompilia's escapade and the Canon's visits.

Aymon Cravetta (1504-1569) was a celebrated professor of law at several Italian schools and in addition to his Consilia, numbering one thousand, wrote a treatise De Antiquitatibus temporum, etc He is cited some twenty times in the O. Y. B.

Section 88.

[Bottini, Pam. 13, clxxvii, 183, § Ad quam etiam.]

To which cause also should be referred her readiness to show herself at the window at the hiss, which by day and at night gave the signal that her alleged lover was passing by, because since her love was feigned in order to attract him, so as to give her help for the flight, by offering himself as a companion for the journey, those indications of love cannot have a greater effect than the alleged love itself, which the hapless wife used as a strategem in order to provide for her own safety. And so the answer recurs: that, given a lawful purpose, the means[1] arranged for its accomplishment are not to be condemned.

[1] media.

Section 89.

[Bottini, Pam. 13, clxxvii, 184, § Praetensus quoque.]

The alleged deceitful manner in which the flight was planned and put in execution by giving a sleeping draught to her husband and the servants,[1] assuming that it was proved, although it was in no manner proved in the proceedings,[2] afforded indeed a proof[3] of her flight, but not of the adultery also, since it was not prearranged for that purpose, but to escape deadly peril, to which the

wife would have exposed herself too carelessly, unless she had by chance found her husband sound asleep while lying with her in bed, or had even brought about such an opportunity.[4]

[1] domesticis; perhaps household or family. [2] in processu [fugae]; the Prosecution for Elopement. [3] indicium; strictly presumption. [4] nisi jacentem in lecto virum sopore oppressum nacta esset, vel etiam talem commoditatem procurasset; Mr. Hodell translates: "unless she had made sure that her husband, who was lying in bed with her, was sound asleep, or unless she had contrived some such easy way."

Section 90.

[Bottini, Pam. 13, clxxviii, 184, § Ne applicantur.]

Nor are the authorities applicable which are cited by the counsel for the defense in § Accedit quod,[1] because the Text in l. consensu, § Vir quoque C. de repud. [Cod. 5, 17, 8, 3] concerns the case of a woman who without just and probable cause spends the night away from her husband's home without his consent, as is evident from the language thereof; which rule[2] is not applicable to our case, since this most wretched wife departed from her husband's house, and betook herself to her father's home,[3] to escape the peril of her life which she feared was threatening her; and so, since she did it "from just and probable cause" the prohibition[4] contained in the Text aforesaid is rather turned back in our favor;[5] and thus also Farinacius, who was cited to the contrary, explains his own statement:[6] — "[The law is] otherwise if it is with cause," adding "because a mere staying out at night does not prove adultery,[7] for a case can be supposed[8] where a wife might stay away at night even with [several] men, and yet not break her marriage vow;"[9] and so very excellently Cravetta

in the cited cons. 105 [205], n. 11, vers. 2, principaliter considero. And since this possibility exists as a fact[10] in our case also, no presumption that adultery was committed[11] can be inferred[12] from her flight and association [with Caponsacchi] on the journey for the purpose of providing for her own safety.

[1] CX, 119, ante sec. 14. [2] dispositio; often in the sense of purview. [3] a domo viri ad patrios lares. [4] censura. [5] retorquetur; Bottini by showing just and probable cause brings Pompilia within the exception of the law, which he claims is accordingly an authority in his favor. Mr. Hodell translates, "turned away." [6] suam assertionem; *his own* Mr. Hodell translates: "the assertion." [7] stuprum, the general term is used. [8] potest dari casus. [9] matrimonii fidem. [10] verificetur. [11] praesumptio sequuti adulterii. [12] desumi, picked out.

AUTHORITIES

Farinacius, qu. 136, is cited by Archangeli, § Accedit quod, CX, 119, sec. 14; this is quoted from his twenty-third presumption of adultery; more fully the passage is "sola pernoctatio non probat stuprum seu adulterium praesertim in criminalibus, quia potest esse quod uxor pernoctaverit cum mulieribus aut etiam cum viris," etc. Cravetta, cons. 20, n. 11, vers. 2, etc., a citation from the same consilium as in § Ingressus et egressus, CLXXVII, 183, sec. 87.

SECTION 91.

[BOTTINI, PAM. 6, LXXV, 82, § EODEMQUE DEFECTU.]

[Secondly] the alleged mutual affectionate kissing[1] on the journey labors under the same defect of proof, since only a single witness testifies to this, whose excessive prejudice[2] is disclosed by his assertion of it,[3] since he asserts that he saw this in the night time, without giving any reason for his knowledge, as that, for instance,[4] the moon was shining at the time, or that he was able to see it by some other artificial light that dispelled the darkness of night. As no such reason was given he deserves no credence,[5] as the following authorities

observe: Bursat. cons. 34, n. 6; Farinac. de Test., qu. 66, n. 38 [qu. 62]; Giurba, cons. crimin. 37, n. 41; Polidor. Rip. in tract. de noct. temp. cap. 57, n. 7, etc.; Vermigliol. cons. 74, n. 1; D. Canonicus Raynald. tom. 1, cap. 11, § 8 to 13, n. 8, fol. 591.

Added to this, moreover, is the very great improbability[6] that while he was driving the carriage and with such swiftness indeed that it seemed rather to fly than [merely] to advance rapidly, he should be able to look back and see them kissing one another.[1] And this improbability[6] likewise deprives him of credence, according to what is held by Farinac. cons. 192, n. 60, at the end; Vermigliol. cons. 20, n. 24, cons. 74, n. 4.

[1] mutua deosculatio; affectionate kissing, as lovers. [2] animositas. [3] ex eius assertione detegitur, dum id vidisse asserit. For id, referring to deosculatio, one would expect eam. [4] scilicet. [5] fidem non meretur. [6] inverisimilitudine.

AUTHORITIES

Bursatus, cons. 34, in summary, says that a witness testifying as to a crime or something done at night proves nothing, unless he says the moon was shining or a light burning. He says that by "common opinion" a witness at night time, distant a cross-bow shot from another, cannot say that he recognized him, and moreover such witness can easily be deceived by the light of the moon. Farinacius, qu. 62, n. 39, says that a witness who testifies that he saw something done at night with no light burning or the moon shining, not only proves nothing, but is also suspected of falsehood. Giurba, cons. 37, n. 41: the witness should state (in such circumstances) his means of knowledge. Raynaldus, Observ. ch. 11, § 8 to 13, n. 8, applies the principle. Polydorus Ripa, de Nocturno Tempore, cap. 57, n. 7, is even more positive. A witness should be suspected of falsehood who says he saw anything done at night, unless he says without being asked the question, that the moon was shining or there was other light. It was not even enough to say, "I saw it because the moon was shining that night;" he must say, "I saw it because the moon was shining at the time the crime was committed." The author draws a distinction, however, between civil and criminal cases, the rule not being so strict in the former. Vermigliolus, cons. 74, n. 1, a case of homicide in the night of June 14, 1627, de nocte circam horam cum dimidia, when the printed Almanac of Maginus and

Argolus (evidently a recognized authority) showed that the moon could not have been then shining, so that the witnesses who testified that they saw it should be discredited.

The reason assigned for this rule by the authorities is that when witnesses depose to something that is contrary to the natural order, they naturally refute themselves; but Polydorus Ripa will not admit this reason without reservation, because it is not inconsistent with the night that the moon should shine, for God made the greater light, the sun, to shine by day, and the lesser light, the moon, to shine at night. All this seems to us like moonshine, but the rule (which was well established) was perhaps due to the practical absence of cross-examination in our sense of the term; hence a witness was expected to forestall the objection that would most probably be raised.

The authorities as to improbability at the end of this section are not in point.

Polydorus Ripa, whose curious treatise, De Nocturno Tempore, is cited in this section and elsewhere, was a Milanese, and taught law at Pisa and Pavia. What would we think now of a legal treatise on Night-Time? It shows the minuteness with which these writers examined every phase of every subject.

Section 92.

[Bottini, Pam. 13, clxxviii, 185, § Mutua deosculatio.]

Their mutual kissing[1] on the journey, assuming that it were proved,[2] would afford no light presumption that her chastity had been violated, but the proof is too loose, as it depends upon the word of a single witness of the lowest character, who deposes to matters that are altogether unlikely, namely, that while he was driving his "flying" carriage, commonly called a Calesse, in its rapid course,[3] he saw Francesca Pompilia and the Canon kissing one another in turn. How prejudiced[4] is this deposition appears from this, that he is looking behind his back at something done at night, and indeed lasting but a moment and soon over,[5] no cause for his knowledge being given, as that the moon was shining, or that some other artificial[6] light afforded the facility of seeing it, as is held

by Bursat. cons. 34, n. 6; Farinac. de Testib., qu. 66 [62], n. 38; Giurba, cons. crim 37, n. 41; Polidor. Rip. de noct. temp., cap. 57, n. 7; D. Canonic. Raynald., book 1, cap. 11, § 8 to 13, n. 8.

[1] deosculatio. [2] quatenus. [3] dum currum volantem, vulgo Calesse, citato cursu ducebat; Mr. Hodell translates: "while he was driving their carriage very rapidly." A witness quoted in the next section and in § Eodemque defectu, ante sec. 91, said it was like flying. Compare the English "fly," for a light carriage. [4] animosa. [5] momentaneum et transitorium: "The kiss snatched hasty from the sidelong maid," as Thomson observes in The Seasons. W. S. Gilbert thus expresses the thought:

> "And I wager in their joy they kissed each other's cheek,
> (Which is what them furriners do)."

[6] aliud artificiale lumen.

AUTHORITIES

All the authorities are those cited in the preceding section, § Eodemque defectu.

As to proof by a single witness we recall Jack Point, the Shakesperean Fool in The Yeoman of the Guard. Fairfax: "And thou didst see all this?" Point: "Aye, with both eyes at once — this and that. The testimony of one eye is naught,— he may lie. But when it is corroborated by the other, it is good evidence that none may gainsay. Here are both present in Court, ready to swear to him."

SECTION 93.

[BOTTINI, PAM. 13, CLXXIX, 185, § AUGETURQUE.]

And the improbability, or rather the incredibility, of this testimony is increased, in that while the witness was intent on driving the carriage[1] with extraordinary speed that was like flying, as another witness testifies, he should have been able to look back, and see their act of mutual kissing, which improbability not merely takes away the credit[2] of a single witness, but would take away that of many witnesses, as in the celebrated case from Perugia on an award of arbitrators,[3] reported by Vermigl. cons. 75 [74], n. 4. Besides, the possibility should be considered that, on account of the

very rapid driving, those sitting in the carriage[1] might have jostled together, and a too curious witness might have believed therefrom that they were kissing one another, when in reality the near approach[4] of their heads or faces to each other would be merely accidental, and not intended for immodest kissing.[5] Moreover, whenever an act can be ascribed to a good end or to an evil one, the presumption excluding the evil is always to be drawn, as is advised by Alex. cons. 128, book 4; Cravett. in the cited cons. 205, n. 9 et seq. And therefore this presumption by reason of defect of proof was justly rejected in the said decision[6] of the case concerning the elopement, which otherwise indeed would not have been rejected.[7]

[1] curriculo; as a diminutive. [2] fidem. [3] in celebri Perusina Laudi relata per Vermigl.; laudum is a word of barbarous coinage, meaning an award of arbitrators. Decisions were not cited by names of the parties, but by the names of the place where the case originated, and of the action. [4] approximatio. [5] ad impudica libanda oscula; Cf. Virgil, Aeneid I, 256, Oscula libavit natae. [6] the judicial report or opinion. [7] Cf. Lamparelli's argument, § Maxime dum, CCLIII, 249, Ch. XII, sec. 20.

AUTHORITIES

Vermigliolus, cons. 74, n. 4, refers to this case as decided in 1614, where the Rota rejected as improbable the testimony of thirteen witnesses. It was evidently a leading case. Alexander, cons. 128, n. 4; this presumption applied in a case of alleged theft. Cravetta, cons. 205, cited ante in § Ingressus et egressus, sec. 87.

SECTION 94.

[BOTTINI, PAM. 13, CLXXIX, 185, § NULLUMQUE FOMENTUM.]

And the excessively improbable[1] and prejudiced deposition of the said witness cannot[2] receive any support from the alleged letters,[3] in which Francesca thanks Caponsacchi for the kisses sent to her, which she professes would be dearer to her if they

had actually been given to her by the Canon, and sends back ten hundred thousand times as many to him; for it does not follow therefrom that if an opportunity were offered this mutual kissing would have taken place, since these are courteous[4] and alluring[5] words proffered for the purpose of enticing him, which do not create an obligation; as is held by Decian. [vol. 2], cons. 55, n. 14; Paris. cons. 89, n. 27 [Part 2, cons. 89, n. 32]; Corn. cons. 129, n. 3 et seq; Laderc. cons. 101, n. 1 and 2; Genua de scriptura privata, book 3, de Epist. n. 13 and 14; and therefore these do not produce any presumption of its fulfilment, especially since the said Francesca many times warned the Canon to observe propriety, and when she found that he had transgressed its limits by sending her verses that were not very proper, she scolded him, lest he should in future become presumptuous in making known his ardent wishes. This is far distant from impure desire to receive his kisses, which are mentioned in her said letter out of courtesy,[6] and is apart from any intention of profaning[7] her matronly modesty.

[1] inverisimilis. [2] valet. [3] XCII, 100; XCV, 102; XCVI, 103. [4] verba officiosa. [5] captatoria, a word used of legacy hunters. [6] officiose, Mr. Hodell translates: "serviceable" and "formally." [7] pudorem temerandi, Mr. Hodell translates "injuring."

AUTHORITIES

Parisius, part. 2, cons. 89, n. 32, seems far-fetched. It holds that in cases of fidei commissum (trust) the intention of the testator is rather to be followed than his words and their strict meaning. Decianus, vol. 2, resp. 55, n. 14; a marriage contract; words in the future do not import a binding obligation. Corneus, vol. 3, cons. 129, n. 3; doubtful words should be interpreted according to the condition (qualitas) of the persons. Ladercius, cons. 101, n. 1 and 2; as to when the language of a letter imports a legal obligation. De Passeribus a Genoa, book 3, n. 13, as to the polite expressions in a letter, "ad aulam potius quam ad forum enunciata," not founding a contractual obligation, e.g., "Tutto il mio è vostro," etc.

No wonder that Mr. A. K. Cook in his Commentary on The Ring and the Book, p. 189, in mentioning Bottini's argument uses an exclamation point! See § Urgente praesertim, CLXXVI, 182, ante sec 82.

Section 95.

[Bottini, Pam. 13, clxxx, 186, § Condormitio tandem.]

Finally, their sleeping together[1] in the same bed, or at least in the same bedroom in the tavern at Castelnuovo, was not taken in consideration in the said decision of the case[2] concerning the elopement, on account of the defect of proof. It was in fact denied by Francesca Pompilia, and the Canon frankly confessed merely that he had rested a little while on another bed that stood[3] in the same room; nor should his brief stay there be construed as a crime, since it should be attributed to the guardianship which he had undertaken of the said Francesca, to whom he had offered himself as a companion on her journey, and therefore he was bound to watch over her so that no evil should happen to her.[4] Whenever, moreover, an act can be said to be done from a lawful motive, the suspicion of evil is absent,[5] as in the very case[6] Cravetta advises, cons. 205, n. 9 et seq., where in n. 15, he says that the interpretation of acts should always be given the most humane construction,[7] although the strict[8] construction may seem more accurate; adding in n. 20 and 21, that it is not enough for the full proof[9] of adultery that a man should have been seen solus cum sola et nudus cum nuda or that a young man should have been found in a closed bedroom with a woman although he have his coat off,[10] and his shoes unfastened, because these things may be merely preparatory, [that is] whenever it is a criminal

case that is under discussion. And therefore much less can a presumption of adultery arise from his brief stay in the same bedroom for the sake of guarding her.[11]

[1] condormitio. [2] the judicial report or opinion. [3] manente. [4] ipsi; not reflexive. [5] cessat. [6] in praecisis terminis. [7] ad humaniorem partem. [8] rigorosa. [9] ad plenam probationem, in its technical sense of absolute proof. It certainly afforded an indicium or presumptio. [10] dispectoratus. [11] We are tempted to ask, Quis custodes custodiet?

AUTHORITIES

Cravetta, cons. 205, n. 9, cited several times in the preceding Sections. The law on this point is more fully discussed by Bottini in § Idque est adeo, LXXVII, 84, Ch. VIII, sec. 80.

SECTION 96.

[BOTTINI, PAM. 13, CLXXX, 186, § NEQUE PROBATIO.]

Nor can proof of their sleeping together in the same bed be deduced from the deposition of the house-servant[1] of the said inn, who asserts that he had been ordered to make up only one bed;[2] for it does not follow from this that both slept in it; but this was done because Francesca wished to rest a little while alone to refresh her strength, which was exhausted by the rapid journey that she had made, while the Canon lay without for her protection, and attended to the preparations for the continuance of their journey; accordingly at the time when the husband arrived he was fulfilling this duty by waiting for the carriage to be got ready. And therefore as no proof of their having slept together can result from such a deposition, and it was justly rejected by my lords the Judges, it needs no further refutation.

[1] cubicularius, chamberman. [2] unum lectum instrui; whether one bed was made up or two does not seem to be very material to the question.

Section 97.

[Bottini, Pam. 13, clxxxi, 187, § Et quamvis Francesca.]

And though Francesca Pompilia in her examination affected[1] to conceal their longer stay at the said inn, by asserting that they had arrived there[2] at dawn,[3] yet no proof of the alleged adultery can be shown[4] from the said falsehood, because perhaps she asserted this in order the rather to avert the suspicion of violated chastity[5] that might have been imagined from a longer stay and greater convenience. Hence, since, if she had confessed this with the circumstances showing[6] that she had preserved her modesty, her confession would have in no respect prejudiced her,[7] so the falsehood cannot prejudice her; as held by Marsil. in cons. 15, n. 15; Bertazzol. cons. 59, n. 7, book 1; Vermigliol. cons. 45, n. 20, and cons. 273, n. 7; Farinac. cons. 192, n. 11 [21], at the middle, vers. Tum etiam, and cons. 222, n. 14 and qu. 52, n. 14 et seq.

[1] affectaverit. [2] ad illud. [3] in Aurora. [4] argui valet. [5] naturally; of course she did; and naturally also Guido's counsel laid much stress on Pompilia's evident falsehood. [6] cum circumstantiis suadentibus. [7] nihil eidem obesset confessio. See on this point A. K. Cook, App. V.

Authorities

Marsilius, cons. 15, states as an example the case of one charged with theft, who falsely denies that he was present at the sale of the stolen article; as Marsilius says, such a lie does not operate to his injury because even if he had confessed that he was present at the sale, it would not follow that he had knowledge of the theft, for we very often see men of the highest character buy and even sell things that have been stolen. So of a man who denies that he was present at a quarrel when he actually was there; such a lie should not injure him because to be casually present at a quarrel is not a crime, nor wrong in itself and not punishable, therefore his denial of it goes for nothing against him. Farinacius, cons. 192, n. 21, and qu. 52, n. 14, cites Marsilius and Bertazzolius, cons. 59, n. 7, book 1. Farinacius, cons. 222, n. 14, a case of alleged violation of copyright privileges, the question being whether

the defendant had the books for sale in his shop. At first he denied having them at all, and afterwards confessed that he had. Farinacius argued that the falsehood should not prejudice the defendant because if he had told the truth at first, it would not have prejudiced him, inasmuch as the gist of the offense did not consist in the possession of the books, but of offering them for sale.

Vermigliolus, cons. 45, and cons. 273, to the same effect. Falsehoods do not constitute indicia for torture when they relate to matters which, if they had been confessed by the defendant, would not have prejudiced him.

Section 98.

[Bottini, Pam. 13, clxxix, 186, § Usus quoque vestium.]

The use also of layman's clothing,[1] in which the Canon was found dressed, cannot afford any presumption;[2] because, since he is not a priest,[3] he cannot be said to be forbidden to do so when on a journey. And perhaps he arranged this for the proper purpose[4] of disguising himself and averting scandal,[5] which might have been imagined by one who saw an ecclesiastic[6] with a woman in the bloom of youth,[7] and as I have heard, of considerable reputation [for beauty], making their journey without the company of another woman or a servant. Therefore the authority of Matth. Sanz. de re crimin. contr. 11, n. 31, does not apply, because in his case there was no concurring cause for which the cleric[8] should go abroad improperly dressed, and equipped with arms, and he had been discovered by the husband either in the crime itself or in acts preparatory thereto, and had been killed on the spot, in which case the presumptions of adultery are properly allowed to diminish the punishment, and they are collected by the said author for that purpose.[9]

[1] vestium laicalium. [2] indicium; in its sense of suspicious circumstance, affording an inference. [3] sacerdos. Nobody claimed

that Caponsacchi was a priest. [4] ad bonam finem; Mr. Hodell translates: "in good faith." [5] se celandi et avertendi scandalum, which was doubtless his precise object. [6] personam ecclesiasticum; Caponsacchi being a Canon was an ecclesiastic. [7] floridae aetatis, et ut audivi non spernendae famae. [8] clericus, used as a general term, as distinguished from layman. Mr. Hodell translates sacerdos, ecclesiasticus, and clericus indifferently as priest. [9] Not Matthaeus Sanzio, as Mr. Hodell states, but Laurentius Matthaeu et Sanz. This is the case of Joannes Vecino in Appendix. His words are, "Clericus habitu indecenti et armis quod malum arguit." His clothing was simply "non clericalis."

The rules as to clerical dress are given in Bellettus, Disquis. Cleric., Part 1, § 16, and seem reasonably strict. In n.14 he says: "ex necessitate tamen itineris licitum est clericis habere vestes breviores," but this Canon appears to have dressed as a layman, though he was certainly a cleric. Joannes Maria Bellettus was Bishop of Gerace, and this was the standard work on the rights, privileges, and penalties of the clergy.

Section 99.

[Bottini, Pam. 6, lxxv, 82, § Omnemque praetensae.]

And the declaration of this most wretched girl properly excludes[1] all suspicion of her alleged infidelity, since this was made after many deadly[2] wounds had been inflicted upon her, and in the moment of death, in answer to the questions of the religious persons[3] and others who were attending her, namely, that she had never forsaken her conjugal fidelity[4] and had always behaved with entire chastity and modesty, as appears from their sworn testimony where we read: "We were present and assisted at the last illness from which Francesca Pompilia, wife of Guido Franceschini, died. She was often asked by her confessors and other persons whether she had committed any offense against the said Guido, her husband, whereby she might have given him occasion to maltreat her in such a manner as to cause her death. And she

always responded that she had never committed any offense but had always lived with all chastity and modesty." And Brother Celestino Angelo of St. Anna, of the order of the Barefooted Augustinians, deposed more exactly[5] to this constant[6] assertion [of her innocence] where he has subscribed as a witness in the said testimony as follows: "She always said, May God pardon him in heaven, as I pardon him on earth; but as for the sin for which they have slain me, I am utterly innocent; in proof whereof she said that God should not pardon her that sin, because she had never committed it." And certainly this declaration, uttered in the moment of death, deserves all credence,[7] since no one is presumed to lie at such a time; as is held by Natta, cons. 537, n. 18, lib. 3; Calderin. cons. 15, tit. de usur.; Menoch. de praesump. lib. 5, praesump. 5, n. 7 et seq. And in the exact case[8] of one suspected of heresy [it is held] that a suspicion of this kind is removed if the suspect at the moment of death should say and protest that he had lived and wished to die, and to believe, according to the tenets[9] of the Holy Roman Church, Decian. tract. crimin. lib. 5, tit. de defens. Reor. cap. 17 [37], n. 27, where he cites the opinion of Albericus in Rubric. C. de haeret. [Codex 1, 5], near the end, vers. Ultimo nota, who asserts that by means of such a declaration made before the Cardinals, the memory of Pope Boniface had been defended, and that he, Albericus himself, had by this means defended Galeazzo Visconti of Milan.[10] And this is especially true, since all the aforesaid witnesses agree that this most wretched girl died with the greatest edification of those present, and always exhibited

the behavior of Christian perfection, as appears in said testimony, where we read: "And from having seen her die the death of a saint," and in another part of the testimony of said Father Celestino Angelo,[11] who infers the innocence of her past life from her behavior just before her death; all of which things are given in our Summary, Number 6.

[1] suspicionem excludere apta est assertio. [2] laetalia; Mr. Hodell translates "severe." [3] ad requisitionem Religiosarum personarum; men of religion or members of religious orders. Mr. Hodell translates "priests." [4] fidei conjugali. [5] praecise; or positively. [6] constanti; or consistent. [7] omnem fidem meretur. [8] in praecisis terminis. [9] placita; Mr. Hodell translates: "what is pleasing to the Sacred Roman Church." Decianus in the passage cited says, "credere id quod tenet sancta mater ecclesia." [10] The house of Visconti ruled Milan for nearly two centuries; Galeazzo held sway 1322-1328; his nephew, Galeazzo II, b. 1354, d. 1378, was succeeded by his son, Gian, who died in 1402. I cannot verify the reference to Albericus except as cited by Decianus. Boniface VIII was the pet aversion of Dante; see especially Longfellow's note to Purg. XX, 87, and Catholic Encyclopedia, articles Boniface VIII and Clement V. These were evidently well-known and extreme cases. [11] Above designated as Frater, and so in the original in Summary, Number 6, LVII, 57.

AUTHORITIES

Menochius de praesumpt., book 5, praesump. 5, n. 6; Baldus gives his opinion that credit should be given to the confession of one condemned to death for extortion of usury as against the claim of the Fisc, since no one is presumed to die in falsehood and sin. Menochius also cites Cravetta, cons. 287, that one who has denied the crime while under torture, and persists in his denial until death, is presumed to be entirely innocent, so as to have purged away every presumption there was against him. Natta, cons. 537, n. 18, also cites Baldus, that if one under sentence of death bequeaths his property for the restitution of what he has unjustly taken, although he cannot make a lawful will, he may do this against the Fisc; nor is fraud presumed in a doubtful case, especially where the sword of man and of God hangs over the head of a dying man, because no one who confesses is presumed at that time to die in falsehood and sin.

Gambi in § Sed cessare, LXVI, 70, Ch. IX, sec. 20, refers incidentally to this question also. See for the argument on the other side, § Nec valet dici, CXXXI, 138, ante sec. 54, and sections following.

Section 100.

[Bottini, Pam. 13, clxiv, 173, § Talis autem.]

But such proof[1] is altogether lacking in our case; for the hapless wife, even until the last breath of her life, most constantly[2] denied the adultery, as appears from the sworn affidavits of the religious[3] men and others, who were taking care of her after she had been mortally[4] wounded; and who unanimously assert that she always affirmed that she had never violated her marriage vows,[5] nor did she implore that such a sin be forgiven by Divine mercy; and this assertion should certainly be considered most important, since no one is presumed to die unmindful of eternal salvation, as in addition to the authorities referred to in my former argument, § Omnemque,[6] is held by the following: Menoch. de praesumpt., book 5, praesum. 5, n. 3; Farinac. de haeresi, qu. 196, n. 31; Decian. tract. Crim., book 5, tit. de defens. Reor. cap. 37, n. 27; Card. de Luc. de Regal. disc. 119, n. 24, and de legat. disc. 27, n. 10.

[1] probatio. Bottini in the preceding section of Pam. 13, § Quidquid enim, clxiv, 172, Ch. VIII, sec. 83, has been speaking of the insufficiency of mere suspicion and the necessity of the clearest proof of adultery, "liquidissima probatio." [2] constantissime; perhaps, consistently. [3] men of religious orders; Hr. Hodell translates "priests." [4] qui eidem laethaliter vulneratae ministrabant; Mr. Hodell translates: "gladly ministered to her after she had been wounded," as though "laethaliter" [letaliter] were derived from "laetus." [5] conjugalem fidem. [6] § Omnemque, lxxv, 82, ante sec. 99.

Authorities

Practically to same effect as in § Omnemque, and see § Exceptio, post sec. 105. Farinacius, qu. 196, n. 31; obstinacy or impenitence is not to be presumed in a doubtful case.

Section 101.

[Bottini, Pam. 13, clxv, 173, § Non relevantibus.]

Nor are the answers relevant, which have been delivered to us by the counsel for the Defense, namely, [first] that this kind of proof which would exclude adultery[1] is entirely deduced from extrajudicial affidavits;[2] [which were, secondly,] extorted, pendente lite, by the heir to remove the annoyances inflicted upon[3] him by the monastery of the Convertites; and [thirdly] that some of those who subscribed thereto are legatees; and [fourthly] that since an assertion of this kind tends to conceal her own disgrace it should not be considered,[4] especially since it was not made under oath, and that although no one is presumed to be unmindful of his eternal salvation, yet all are not presumed to be free from sin, like John the Baptist,[5] and most especially, whenever[6] the case concerns the prejudice of a third party, and the severer punishment of an enemy of the person making the declaration.

[1] probatio exclusiva adulterii. [2] ex fidibus extrajudicialibus. [3] molestiis illatis, i.e., the suits brought or threatened. [4] cumque talis assertio tendat * * non sit attendenda. [5] St. John the Baptist as immune from original sin, Cf. § Nec valet, cxxxi, 138, ante sec. 54. [6] quoties.

Section 102.

[Bottini, Pam. 13, clxv, 173, § Quoniam omnes.]

Whereas,[1] all these defenses are refuted with little trouble: [for I reply, first] the informality[2] of the proof might indeed be an objection, if the Fisc were bound to assume the burden of proof

and to present it complete. But, since such burden rests upon the accused (according to the arguments previously delivered[3]), in order to avoid the death penalty in the case where he has murdered[4] his wife after an interval, and since such affidavits[5] are only adduced to weaken the proof[6] produced by him of the alleged adultery, in this respect certainly the affidavits should not be disregarded, especially when the character[7] of the deponents is considered, since they are religious persons[8] of well-known integrity, and that they should have lied intentionally, is not credible; as, according to the Text in cap. Si Testes, 4, qu. 3, cap. In nostra [editione] de Testibus [Decretum Part 2, caus. 4, qu. 2 and 3, cap. 3], is held by Alex. cons. 43, n. 4, vol. 7; Cravatt. cons. 267, n. 2, vol. 1; Menoch. cons. 221, n. 3, lib. 3; Farinac. de Testib., qu. 70 [60], n. 471; Bellett. disquis. Cleric., part 1, tit. de Clerico Teste, § 1, n. 1 et seq.

[1] Quoniam; Mr. Hodell translates: "Now that all these claims are destroyed with so little trouble." [2] informitas. [3] ex supra traditis. [4] necavit. [5] attestationes. [6] offuscandum, literally darken or obscure. [7] qualitate. [8] Mr. Hodell translates, "priests."

AUTHORITIES

Cravetta, cons. 267, n. 2, says that the testimony of four clerks is worth as much as that of six laymen. Menochius, cons. 221, n. 3, quotes Alex. cons. 43, who says that the testimony of a priest is preferred to that of a layman on account of the greater presumption of his good character and integrity. Farinacius, qu. 60, n. 471: men of religious orders and priests are presumed to tell the truth and may testify in favor of their corporation (universitas). Bellettus Disquistio Clericalis, Part 1, de Clerico teste § 1, collects the authorities.

Decretum Part 2, caus. 4, Quaest. 2 and 3, cap. 3, in nostra [editione]. In this chapter Gratian has referred to various laws of the Digest and Codex. Sometimes he uses the same words and sometimes changes and transposes them. In Gratian's Decretum, e.g., in the edition of 1552, the chapters are not numbered; Bottini means to say that in his copy or edition Si Testes is Number 3.

Section 103.

[Bottini, Pam. 13, clxv, 173, § Eademque replicatione.]

And [secondly] by the same reply there is refuted the defense, that these affidavits were extorted by the heir, pendente lite, to remove the annoyances inflicted by the monastery of the Convertites, because when the case concerns the proof of an assertion, uttered in the last days of life and in the very moment of death, the proof cannot be established unless death has followed;[1] and the heir is to be commended, because he is bound to avenge the death of the deceased lest he be considered derelict in his duty,[2] in literal accordance with the Text in leg. 1, C. de iis quibus ut indignis [Codex 6, 35, 1]: "Let the heirs, who are proved to have let the murder of the testator go unavenged, be forced to restore the entire proceeds, etc." Thus it is advised by Angel. on this passage, n. 2; Bartol. n. 1 and 5; Castrens. n. 1; Jason, n. 1. [The heir is to be commended] if he procured the said affidavits that he might at least protect the reputation of the testatrix, to which he was exerting his efforts, rather than to repel the annoyances unjustly inflicted upon him, and the very cessation of which can be used as a contrary argument for the exclusion of the alleged proof of the infidelity of the hapless wife.[3]

[1] nisi ea secuta. I suppose ea refers to mors and that Bottini means the declarations cannot be proved unless they were actually dying declarations. Mr. Hodell translates: "unless this holds good." [2] ne indignus reputetur: to have acted unworthily. [3] et quarum ipsa cessatio retorqueri potest ad exclusionem praetensae probationis inhonestatis infelicis uxoris. The sentence is not clearly expressed; I suppose quarum refers to molestias, and

not to attestationes, in which latter case we must consider inhonestatis a misprint for honestatis. Perhaps cessatio is a misprint for cassatio, signifying quashing or annulling.

Section 104.

[Bottini, Pam. 13, clxvi, 174, § Minusque obstare.]

And [thirdly] still less can it be objected that some who subscribed the affidavits are legatees, since their interest is not so considerable[1] as to exclude them from bearing witness, as is advised by Herculan. in tract. de negat. n. 215; Lamberteng. de contract. glos. 10, n. 4 [14]; Boss. in tit. de opposit. contr. Test. n. 123 et seq.; Mascard. de probat. lib. 1, concl. 318, n. 4, and lib. 3, concl. 1357, n. 69 et seq.; Osach. decis. Pedemont. 99, n. 13 and 38. Especially is this so, whenever the question concerns the proof of a thing which happened within the walls of a dwelling, the proof of which is therefore considered very difficult, as is observed by Alex. cons. 64, n. 1, lib. 1; Farinac. de Test. qu. 6, n. 58 et seq., with the authorities there cited. And such an objection, so far as it has any force,[2] would be supplied from the number[3] of the other subscribing witnesses to the said affidavits, as is held by Angel. in l. qui Testamento, n. 3, ff. de Testam.; Campeg. de Testib. regul. 75, in prima fallen.; Farinac. qu. 70, n. 68; Rot. coram Royas. decis. 353, n. 5 and 6, decis. 466, n. 8; coram Buratt. dec. 143, n. 38, and coram Merlin. dec. 277, n. 11.

[1] considerabile. [2] quatenus subsisteret. [3] ex numero aliorum; Mr. Hodell translates: "is utterly removed by the number of the witnesses to the said attestations."

Authorities

Herculanus de probanda negativa, n. 215, relates to cases where the advantage to the witness from his testimony is incidental or secondary,

rather than direct, and seems to require a statement from the witness to that effect. Lambertengus de contractibus, gloss. 10, n. 14, on the authority of Tiraquellus declares that the rule of interest does not apply where the benefit is consequential, i.e., indirect. A legatee may testify in favor of the will, a prelate for his church, a creditor for his debtor, etc. Bossius Tit. de oppositionibus contra testes, n. 123, says on the authority of Alexander that a creditor may be a witness in an action against his debtor, notwithstanding his interest. Mascardus, vol. 1, conclus. 318, n. 4, a member of a college may testify in its behalf. Mascardus, vol. 3, conclus. 1357, n. 69, is an erroneous reference. Osascus (Cacheranus), dec. 99, n. 13 and 38, the interest to disqualify must be immediate and direct, not merely consequential.

Royas (de Roxas), dec. 353, n. 5: "The objections made to some of the witnesses do not signify because although they have some defect, yet that is made good by their number, which is the case although all are subject to objection" ("ille tamen suppletur ex illorum * * quod procedit etiamsi omnes patiantur exceptiones"). This is reported in dec. 466, n. 8. But Burattus, dec. 143, n. 38 (note), says that this is to be understood when some of the witnesses are without exception, otherwise if all are subject to some exception; for then their defects cannot be made good, and this was the decision in Merlinus, dec. 227, n. 10 and 11. As we have not the full facts given in the O.Y. B., it is impossible to arrive at a conclusion on this point. Swinburne on Wills, Part 4, sec. 21, in connection with the two witnesses required for proof of wills, says that if there are more than two, the increase in number supplies the defective competency of some of them.

Section 105.

[Bottini, Pam. 13, clxvi, 174, § Exceptio.]

But [fourthly] as to the objection that the declaration of a dying person should not be considered, seeing that it tends to his own exoneration,[1] because no one is compelled to disclose his own disgrace. Perhaps this might hold good, if the adultery had been proved, and if it were not evident that she had, after being wounded,[2] died with the strongest manifestation of Christian penitence, which would exclude the suspicion of falsehood. In such a case the objection does not hold good, but another very powerful presumption takes its place, that no one is believed to be willing to die unmindful of his eternal salvation, as

Mascardus, who is cited by our opponents,[3] advises, de Probat. conclus. 144, n. 2, where he replies to Baldus — likewise cited for the contrary opinion, in Tit. De pace constantiae, verbo. Vasalli, in usib. feud., asserting that not every one who is dying is St. John the Evangelist,[4] — by showing that Baldus contradicts himself[5] since, in cons. 25, book 1, he says that a confession uttered at the moment of death[6] is effective, and Mascardus adds that this comes nearer the truth, citing in confirmation of this opinion Marsil. cons. 5, n. 14 and 15, book 1, and Anchar. cons. 151, who affirms that if any one should assert that one who is placed[7] in articulo mortis lies, he would say what is improbable. And [Mascardus] concludes that this opinion is the more just and more agreeable to reason and natural law; and although he brings forward some limitations, yet none is applicable to our case; and the question of law which he is discussing concerns the declaration of a wounded man, whether it constituted a presumption[8] against the person accused by him, and this is utterly different[9] from our contention, since, as has been observed, the burden of proof does not rest upon the Fisc; nor does the declaration of our dying woman[10] tend chiefly to vengeance, since it appears from the said affidavits, that she shrank with horror from that, as she always claimed that she pardoned her husband most freely.

[1] exonerationem, see Glossary. [2] Mr. Hodell translates: "though wounded." The point is that the declarations were made after Pompilia had been mortally wounded and in the realization of approaching death. [3] By Spreti in § Nec valet, CXXXI, 138, ante sec. 54. [4] See as to St. John the Baptist in note to § Nec valet. [5] ipse est sibi contrarius. [6] in articulo mortis. [7] constitutum in articulo mortis; Mr. Hodell translates: "making oath in the hour of death." [8] an faciat indicium contra inculpatum; not "proof." [9] toto coelo distat; Mr. Hodell translates:

"by the whole heaven." We might say "as distant as are the antipodes." Bottini's argument is that even if the opinion of Mascardus is against him, which he denies, yet after all, Mascardus was not discussing the same question. [10] assertio nostrae morientis.

AUTHORITIES

Mascardus de Probat., conclus. 144; a discussion of the question whether the dying declarations of a wounded man are evidence against the homicide. He seems to give an affirmative answer, because the declarant is not supposed to lie unless we say that he is unmindful of his eternal salvation; since everyday experience, our school master, teaches us that men in the moment of death are generally concerned about their salvation, and very many knaves and criminals display the signs of repentance with the last breath of their life. The contrary opinion, he says, is held by Angelus and others. Alexander says that an assertion of this sort affords only a cheap presumption, while Baldus says that not every one who dies is a St. John the Evangelist. He adds: You may reconcile these opinions in this way, that the first opinion holds good when other proofs concur, but the second when there is only the assertion of the wounded man (citing Paris. de Puteo and Grammaticus), besides Baldus himself, cons. 25, book 1, held the contrary and expressly affirms that a confession made in articulo mortis is good, because it is not to be presumed that such a one should lie in his confession; which certainly approaches more nearly the truth, than what the same Baldus said in the said vers. Vasalli; since it more frequently is wont to happen that the majority as they depart this life strive not to die before they repent of their sins; and this opinion is followed by Marsilius, cons. 5, n. 14 and 15, book 1, and cons. 109, n. 33, book 2, and Ancharanus, cons. 151, who says that whoever asserts that one constitutus in articulo mortis lies says what is not probable, and if any one disputes this, he should not be listened to. The limitations added by Mascardus are that the statement be made with an oath, that the declarant be compos mentis, and that the statement be not capable of proof by other witnesses.

Compare with this section, Spreti § Nec valet dici, CXXXI, 138, ante sec. 54, who cites Mascardus in this conclus. 144, n. 8 [10], as stating what is really the opinion of Natta. Bottini says that none of the limitations of Mascardus apply to the present case, but it does not appear that Pompilia's statements were made under oath. I cannot find, however, from the authorities in general that an oath was required, though it probably added force to the declaration. Gambi in § Sed cessare, LXVI, 70, Ch. IX, sec. 20, refers incidentally to this matter of dying declarations and cites the Text in l. fin. C. ad Jul. repetund. [Cod. 9, 27, 6], repeated in Decretum as cap. Sancimus [Part 2, caus. 2, qu. 7, cap. 26]. See as to the dictum of Baldus, note to § Nec valet, CXXI, 138, ante sec. 54, and see § Omnemque praetensae, ante sec. 99, and § Talis autem, ante sec. 100.

CHAPTER VII

THE ARGUMENTS AS TO THE GUILT OF POMPILIA BASED ON CAPONSACCHI'S CONVICTION

ARGUMENT FOR THE DEFENSE

I

Pompilia was guilty according to the decree of the Court in the Prosecution for Elopement. The question of res judicata.

1. The decree of the Court condemned Caponsacchi to relegation for carnal knowledge of Pompilia. Section 1

II

REPLIES TO THE ANSWER OF THE FISC

1. The decree was not modified as the Fisc claimed. 2

2. And it could not have been modified without notice to the other side. 6

3. And any modification of the decree would have been too late after knowledge of the decree had reached Guido. 8

4. The lightness of the punishment does not affect the force of the decree. 9

a. Nor can it concern its effect on Guido, who was by the decree incited to vengeance. 10

b. The lightness of the sentence was due to the fact that Caponsacchi was a foreigner, who committed the crime outside of the Ecclesiastical State. 11

Section 1.

[Arch., Pam. 1, xi, 13, § Sed etiam.]

[The adultery is not only proved by the facts of the case as heretofore shown] but also[1] from the sentence of the Judge who condemned her lover for his carnal knowledge of her which made the adultery notorious.[2] Cap. Vesta de cohabiti. Cleric. & Mulier. cap. fin. tit. eod. [Decret. III, Tit. II, cap. 7 and cap. 10], and in terms Viv. decis. 297 [241], n. 12 and 13, lib. 1.

[1] sed etiam; in apposition with nedum in § Et praemisso, x, 13, ante Ch. VI, sec. 6. This introduces the second branch of the argument, that Pompilia's guilt was res judicata. [2] that is, a matter of public record.

Authorities

Vivius, dec. 241, n. 12 and 13. Adultery should be said to be notorious or public when a sentence is pronounced against the woman as an adulteress.

Section 2.

[Spreti, Pam. 9, cxxvi, 134, § Absque eo quod.]

[This is so, i.e., that the causa honoris relieves from the death penalty] notwithstanding[1] what could be more fully alleged on the other side at this stage of the case, viz.: that the causa honoris does not fully appear; because the decree condemning the Canon Caponsacchi for the said adultery, which was entered in this tribunal[2] on the 24th day of September last past, and which is given in full in our Summary Number 8,[3] makes the matter clear and manifest; Cap. Vestra, § quibuscumque vers. Caeterum aliud est [Decretal, lib. III, Tit. II, cap. 7]; cap. Quaesitum de Cohabit. Cleric. et Mulier. [Decretal, lib. III, Tit. II, cap. 10]; for it

there said: "Joseph Maria Caponsacchi of Arezzo for complicity in the elopement and the seduction of Francesca Comparini,[4] and for carnal knowledge of the same is banished [relegatus] for three years to Civita Vecchia." Nor can these words be said to be merely the title of the case[5] (which does not make any one guilty), as my Lord the Advocate of the Fisc alleges, but [this is] the very decree itself,[6] since indeed the title of the case, as seen by me in the original record of the proceedings, was this that follows: "*Aretii in Etrutria fugae a viro.*" [A case from Arezzo in Etrutria of elopement from a husband.][7]

[1] Absque eo quod. [2] in hoc tribunali; the Court of the Governor in criminalibus. [3] XCVIII, 106. [4] Note that she is called Comparini; not Franceschini. [5] titulus causae; title or charge, see Glossary. Apparently the charge contained in the title. Mr. A. K. Cook in his commentary, p. 137, says that titulus means the reasons stated in the decree, which does not seem to be sound. [6] Mr. Hodell translates: "the very decree and the title of the case was that which follows." [7] The ordinary caption of a case was to state, first, where it was tried or originated, in the genitive, as here, Aretii, and then the nature of the case. The prosecution of Guido was thus Romana homicidiorum. The same method was followed in civil cases. Fuga a viro was simply elopement. Deviatio is not "the running away" of Francesca, as Mr. Hodell translates, but the leading astray or seduction; Scanarolus De Visitatione, App. cap. XXII, mentions some cases. The condemnation of Caponsacchi as stated in the decree was threefold: complicity in the flight or elopement of Pompilia; her seduction; and carnal knowledge of her. See Glossary, deviatio, and Ch. I ante. Bottini, however, in § Quod autem, CLXVIII, 176, post sec. 17, endeavors to merge the complicitas in fuga and the deviatio as combined in one offense, yet he says there were "plures tituli," which means more than two.

AUTHORITIES

Decretal, Book III, tit. II, cap. 7: Ceterum aliud est crimen notorium, aliud occultum. Notorium definitur, de quo presbyter canonice condemnatur. Decretal, Book III, tit. II, cap. 10: Clericus concubinarius in officiis vitandus non est, nisi sit notorius (per sententiam seu per confessionem, etc.).

Section 3.

[Spreti, Pam. 16, ccxxvii, 229, § In presenti sumus.]

At present we are [concerned] in a case not merely of the clearest proof, but of notorious fact, because we have the decree of this tribunal by which adultery of this kind[1] was made a matter of record;[2] and although the words of this decree are related in our present argument, § Absque eo quod,[3] I wish to repeat them here because they are exceedingly clear: — "Joseph Maria Caponsacchi of Arezzo for complicity in the elopement and the seduction of Francesca Comparini, and for carnal knowledge of the same, is banished (relegatus) for three years to Civita Vecchia."

[1] huiusmodi adulterium; i.e., adultery shown by clear proof, the reference being to the preceding § Omissa ulteriori, ccxxvii, 229, Ch. VIII, sec. 34, which holds that in such a case vengeance may be taken after an interval without the ordinary penalty of the Lex Cornelia. [2] canonization; see Glossary, and note § Demum sententia, cxi, 120, post sec. 8. [3] cxxvi, 134, ante sec. 2.

Section 4.

[Spreti, Pam. 9, cxxvi, 134, § Nec verum est.]

Nor is it true that there was any departure made from the said decree,[1] and still less was a modification of it directed,[2] for we have no other fact but this, viz.: in order that some little favor might be shown to the still asserted honesty of the woman, and the respectability of the Canon, for which the Procurator of Charity[3] who defended them kept zealously and constantly arguing, these other words were used in the warrant for the discharge from prison,[4] in place of the words of the said decree, "Pro causa de qua in actis" [For the cause

concerning which in the record]; which surely do not imply the correction[5] of the preceding words, but rather the virtual inclusion[6] of the entire record and consequently also of the said decree, according to the familiar[7] l. asse toto ff. de haered. Instit. [Dig. 28, 5, 78], with others cited by Paris. cons. 108, n. 47, book 1; Rot. coram Priolo, decis. 423, n. 4.

[1] recessum ab dicto decreto. Cf. Cicero, Nam ab edicto meo recessissem. Perhaps we should translate "alteration." [2] demandata moderatio; directed, not demanded as Mr. Hodell translates. The Procurator of Charity did "demand" the change in the decree. Lamparelli (the Procurator) in his argument § Demum nullum, CCLV, 250, Ch. XII, sec. 24, says he requested it, and that the change was directed but not drawn up, although a change was made in the warrant. Moderatio; salva moderatione concilii generalis was a formula sometimes used in Papal Bulls. [3] Lamparelli. [4] in mandato de excarcerando; Mr. Hodell translates: "the command for imprisonment," but the culprit was already in prison, and this was the mandate or warrant for his discharge, in order that his sentence might be executed. See Glossary. [5] correctio; as a rhetorical figure signified the substitution of a stronger or more significant word. [6] virtualem omnium actorum * * insertionem, see Glossary. [7] vulgata.

AUTHORITIES

The citation from the Digest concerns the institution of an heir by means of a codicil to which the will refers; a case of inclusion by reference. The analogy is not striking; but it will be remembered that the slightest relevance of a text of the Digest was a sufficient basis for argument. The summary or syllabus of Parisius, book 1, cons. 108, n. 47, is "relatum continetur in referente," and Priolus, dec. 423, is only a similar general statement.

SECTION 5.

[SPRETI, PAM. 16, CCXXVII, 229, § NON AUTEM PRAETERIRE.]

But I cannot pass over what is still[1] alleged, that this form of decree was revoked; because as I said in my argument, the contrary is the truth;[2] for all

we have is this, that in the mandate for removing the convicted Canon from prison,[3] there being omitted the recital of the entire decree as above recited, it was said *Pro causa de qua in actis* [for the cause concerning which in the record], which words are so far from showing the said revocation that they even establish the confirmation of the said decree, as we have proved in our argument, § Nec verum est,[4] which same thing should be said[5] of the like words employed by the notary in the bond which Francesca Pompilia executed for keeping her father's home as a prison, when she was transferred to it from the monastery, where she was dwelling in safe keeping, on the ground of her supposed illness, but to speak more truly, of her pregnancy, which she wished to conceal by means of an abortion.[6]

[1] adhuc; perhaps, "at this point." [2] veritas est in contrarium; the truth is to the contrary. [3] in mandato de excarcerando; the warrant for removing from prison; see § Nec verum est, CXXVI, 134, ante sec. 4. [4] CXXVI, 134. [5] dicendum venit; the bond given by Pompilia, CLX, 159, contains this general phrase, "pro causa de qua in actis;" the argument is that this general expression amounts in fact to a confirmation of the decree made upon the record. [6] quam malo fato voluit abscondere; perhaps facto. Pamphlet 10, CXLVII, 151, plainly refers to this.

AUTHORITIES

Cf. forms in Bassanus Theorico-Praxis Crim. E.g., a mandate, book 6, Ch. 1, n. 123: "pro causa et causis de quibus in processu," etc. Mr. A. K. Cook in his Commentary on The Ring and the Book, p. 136, thinks that the decree was actually changed, and that both sides agreed on this point; but it is clear that no change was made in the decree and none, as Spreti says, was directed by the Court. All that was done was to modify the phraseology in the warrant when Caponsacchi was discharged from prison to undergo his relegation, and when Pompilia was transferred from the monastery to her father's home, her bond to keep the same as a prison contained the same wording. Bottini admits, § Eoque minus, post, sec. 15, that the decree was not altered in the docket where decrees are noted.

Section 6.

[Spreti, Pam. 9, cxxvii, 134, § Eoque magis.]

And this is all the more true, because the said decree could not be changed without both sides being heard, as I myself remember[1] was the answer given to the said Procurator when he was insisting upon the said modification, according to the Gloss on l. diversa, Cod. de Transact. [Si diversa, Cod. 2, 4, 14?]; Bartol. in l. acta, vers Tertiam opinionem, Cod. de Re Judicat. [Cod. 7, 52].

[1] Caponsacchi and Pompilia were represented in the Prosecution for Elopement by Lamparelli, as Procurator Charitatis; but Spreti was Advocatus Pauperum and may well have been present even if he were not actually, as we say, of counsel.

Authorities

The Gloss on the Codex seems to support the argument. The Comment of Bartolus, if the reference be correct, refers only in general to the perpetual effect of a judgment as res judicata.

Section 7.

[Spreti, Pam. 16, ccxxvii, 230, § Tanto magis.]

So much the more is this true, because the alleged revocation of the decree could not have been made when the other side had not been heard, just as I have said in my argument, § Eoque magis.[1]

[1] cxxvii, 134, ante sec. 6.

Section 8.

[Arch., Pam. 8, cxi, 120, § Demum sententia.]

Finally, the judgment or decree of this tribunal, which is given in the Summary, Number 8,[1] where the said Canon is sentenced for carnal knowledge of Francesca, removes all doubt; because it makes the adultery notorious,[2] as was proved in our other

argument.[3] And although it is asserted that my Lords the Judges had it in mind to modify this decree and to add "pro praetensa cognitione carnali" [for alleged carnal knowledge], yet it was not modified; and none the less the unlucky husband would not have been prejudiced by such modification, after it had come to his ears that his wife's adultery was manifest and notorious, that is to say, made a matter of record[4] by the decree of the Judge.

[1] XCVIII, 106. [2] notorium, Mr. Hodell translates "infamous." It means a matter of public record and is so explained by the word canonizatum a few lines below. [3] Archangeli refers to his "other" argument, i.e., that presented in the first stage of the case before the decree for torture; § Sed etiam, XI, 13, ante sec. 1. [4] canonizatum scilicet. It is rather amusing to hear an Archangel speak of canonizing adultery, and a Canon's adultery at that. But probably Archangeli did not see the joke. As to canonizatum, see Glossary. The argument is that as soon as Guido knew of the terms of the decree, and he must have known of it, indeed it was "notorious" as a matter of public record, the mischief was done, so far as he was concerned, and its subsequent modification, even if it had been made, should not operate against him.

Section 9.

[Spreti, Pam. 16, ccxxviii, 230, § Sicuti praeterire.]

Likewise I cannot pass over what is said, that the Canon was sentenced merely to the punishment of banishment [relegation], because of the failure of the proof of the adultery; for if such[1] proof had not existed, by what right could my Lords the Judges have expressed in their decree that they were condemning him for carnal knowledge of the said Francesca Pompilia? Therefore it is the truth that the Judges considered that the said adultery was most conclusively proved,[2] and the said Canon convicted thereof, since in the record[3] nothing else

was lacking but their detection in the foul act itself; and that this is not necessary to prove adultery de Afflictis stated in such a case in Constitution si maritus n. 4 [5], vers. Et pondera; and he is followed by Farinac. qu. 121, n. 42; Polic. de Reg. Aud. book 2, tit. 10, cap. 7, n. 29, vers. Ac proinde, page 34.

[1] huiusmodi. [2] habuerunt pro concludentissime justificato. [3] in processu.

AUTHORITIES

Farinacius, qu. 121, n. 42, sustains the text, as does de Afflictis in Const., book 3, Rub. 46, Si maritus, n. 5, who says actus inhonesti are enough.

SECTION 10.

[SPRETI, PAM. 16, CCXXVIII, 230, § QUOD VERO POENA.]

That the punishment to which the said Canon was sentenced does not indeed correspond with the said crime, — as to this many replies may be made, but because this [the lightness of the penalty] does not concern Count Guido, let this also likewise pass by. For however that may be, who is there who can deny that the said Count Guido, having perused the decree, which did not need a gloss, ought justly to be angered[1] by the violation of her conjugal fidelity to himself, and that if afterwards he took vengeance for such[2] a violation he should be in some measure[3] excused? There is the Text in l. si adulterium, 38, § Imperatores ff. ad l. Jul. de Adulter. [Dig. 48, 5, 39 (38)], and in l. si quis in gravi, § si quis moriens, at the end, ff. ad S. C. Syllan. [Dig. 29, 5, 3, 1]; and the authorities so hold which were collected by us with a full hand in our past argument, § Et conciliando.[4]

[1] See also on this point l. mariti ff. ad leg. Jul. de Adult. Dig. 48, 5, 30 (29). [2] huiusmodi. [3] aliqualiter. [4] XXV, 27, Ch. VIII, sec. 4, in Pamphlet 2, before the decree for torture; hence "in our past argument."

This section is in reply to the Fisc's argument, and opens with Spreti's statement of it; but Mr. Hodell gives it as Spreti's own assertion and admission.

Section 11.

[Spreti, Pam. 9, cxxvi, 134, § In tantum vero.]

But in brief[1] the said Canon was condemned merely to the said punishment because he was a foreigner, and had committed the crime outside of the [Ecclesiastical] State,[2] in which case he ought to be merely dismissed with [a sentence of] exile.[3] Farinac. qu. 7, n. 7, vers. Sed quid erit faciendum, at the end.

[1] in tantum; perhaps "in so far as it is worth while to mention it." [2] The complicity in the elopement and the deviatio were committed at Arezzo; whether the adultery was committed there, at Foligno, or at Castelnuovo (probably the last) or at none of them, was the matter in dispute. [3] cum exilio. Exilium was often used loosely as a general term.

Authorities

Farinacius, qu. 7, n. 7, discusses the position taken by Bartolus and others that a thief can be punished in the place where he is found with the stolen goods, although this is neither the place of the theft, or of his origin or domicil. Farinacius disagrees with this, and then asks what should be done with the thief? Shall he be remitted (i.e., extradited, as we should say) to another court of competent jurisdiction according to the opinion of Covarruvias and others? He concludes that the thief should be ejected from the place where he was captured and discharged in freedom. Says Dogberry: "The most peaceable way for you if you do take a thief, is to let him show himself what he is, and steal — out of your company." Farinacius is here describing the general subject.

This argument of Spreti's is answered by Bottini, § Agnoscit, clxix, 177, et seq., post sec. 19, and was a mistake, as it enabled the Fisc to shift the argument to a collateral point where the authorities were on his side. Spreti's argument in the preceding sections is much stronger, and he should have rested on it.

As to Caponsacchi's alienage; according to modern systems of legislation the laws are territorial; that is, they bind all persons within certain territory. But in ancient jurisprudence the laws were often personal, and their applicability sometimes depended upon the nationality of the individual. Wessel's History of the Roman Dutch Law, Ch. VIII.

ARGUMENT FOR THE FISC AS TO THE FORMER DECREE OF THE COURT AND THE QUESTION OF RES JUDICATA

Section

1. The former decree of the Court does not prove Pompilia's guilt, but rather proves her innocence. Neither Pompilia nor the Canon confessed, nor were they proved guilty, and the presumptions being light, could only support a light or discretionary punishment. 12

2. The insertion, in the decree of condemnation of the Canon, of the words "carnal knowledge" is not relevant because it was directed to be modified, and a general title (or charge) substituted.

a. The decree was entered without notice to her, and her guilt or innocence depends upon the proof in the proceedings. 13

b. Although the correction, "Pro causa de qua in actis," was not made in the docket, yet it appears in the warrant of banishment of Caponsacchi, and in the decree assigning Pompilia's home as a prison, which presumably was with the knowledge of Abate Paolo, in charge of the case. 15

c. A decree pronounced against the Canon could not prejudice Pompilia as it was res inter alios acta. 16

d. The correction being made in the singular number, "Pro causa de qua," this expression cannot be understood to refer to "carnal knowledge." 17

3. The lightness of the punishment of the Canon shows that no adultery was committed. Section 18

4. The answer that the mildness of the punishment was due to the fact that the Canon was a foreigner is inadequate for several reasons.

a. Because Rome is the mother city of all men and those may be punished there who committed crime beyond the limits of the Ecclesiastical State. 20

b. Especially when the crime is committed by an ecclesiastic. 21

c. If the offense of which he was convicted was his conducting Pompilia to the City, he is punishable there. 22

d. As the alleged adultery so far as it is proved, took place at Castelnuovo within the Ecclesiastical State, he would be punishable in Rome. 23

5. As the alleged condemnation of the Canon is excluded, so also is the notoriety of the adultery, and hence this excuse offered for Guido is invalid. 24

Section 12.

[Gambi, Pam. 12, clix, 165, § Ad quid tempus.]

Why should we waste time in discussion of the point[1] whether the adultery, which is alleged by the other side to have been committed by Francesca de Comparini with Canon Caponsacchi, is sufficiently proved? Since in our first brief of the facts and the law we have said that judgment was given in the Congregation[2] only for the punishment

of banishment[3] to Civita Vecchia against the aforesaid Canon, and for the retention of the said Francesca in a monastery,[4] by reason of the defect of proof of the said adultery. And this was justly done according to law, because neither the Canon himself nor the said Francesca have confessed, much less been proved guilty, and because the presumptions deduced by the other side are light and equivocal; although, even if they were weighty, or even most weighty, they would not be sufficient to establish conclusive[5] proof, but at the most[6] could lead the mind of the judge to impose some light or discretionary punishment, as Farinacius affirms according to the general opinion of the Doctors; Farinac. qu. 136, n. 24.

[1] articuli, or specification: as we would say, "articles of impeachment," etc. [2] in congregatione; Gambi refers to Pam. 5, § Facti ideo, LXI, 65, Ch. VI, sec. 59. The congregation or full court of the Governor. [3] poena relegationis. [4] in conservatorio. [5] concludentem. [6] ad summum.

AUTHORITIES

Farinacius, qu. 136, n. 24, enumerates the cases in which a presumption of adultery arises, which, however, warrants the infliction of an extraordinary punishment or pecuniary fine.

SECTION 13.

[BOTTINI, PAM. 14, CXCV, 200, § NON RELEVANTE.]

Nor is it relevant that,[1] in the decree of condemnation of the said Canon for relegation to Civita Vecchia, there had been written the title[2] of "carnal knowledge," because as was previously[3] answered, a modification of it was directed,[4] and the substitution of a general title relating to the proceedings of the prosecution,[5] and since no proofs[6] of it appear from the proceedings, or from the defenses which the hapless wife, who was discharged

under a simple bond[7] for keeping her home as a prison, could have made if she had not been so barbarously murdered (since the said decree had been entered[8] without her having been summoned or heard), it [the title "carnal knowledge"] would certainly have been stricken out,[9] and [therefore] the inscription made by the Judge in the record[10] of the title of the crime could not make her out to be guilty,[11] but the truth of the fact resulting from the proofs is to be considered; as according to the Text in l. famosi, § hoc autem [tamen] crimen. ff. ad l. Jul Maiest. [Dig. 48, 4, 7, 3] is held by Mastrill. de indult. gener. cap. 29, n. 19, vers. 3 [Tertio] confirmatur; Franc. decis. 330, n. 6; and thereon Viscont. in add. Reverendiss. Verulan. ad Statut. Faventin. book 4, rubr. 14, n. 14.

[1] non relevante. [2] titulus, see Glossary. [3] Where? I find no previous reference to this by Bottini. His argument in Pam. 13 follows this in order of time, and in § His potius, CLXVII, 175, post sec. 14, expressly refers to this section. He probably refers to Gambi's argument. [4] demandata; not demanded by counsel, but directed by the Court. [5] relativi ad processum. [6] indicia; i.e., suspicious circumstances. [7] cum simplici cautione; Mr. Hodell translates: "with the mere precaution." Simplex cautio might apparently mean a bond without surety, but it is elsewhere spoken of as a bond with sureties, and the record, CLV, 159, shows that a surety was given. [8] emanata; i.e., from the Court. [9] elisa remansisset; referring to "cognitio carnalis," or perhaps a misprint for elisus, referring to titulus; the meaning is the same. Mr. Hodell translates: "the said decree would be void." [10] penes acta; inscriptio; the heading of the decree. [11] ream efficere non valuit.

AUTHORITIES

de Zaulis ad Statut. Faventin., book 4, rubric 14, n. 14, is probably an erroneous reference. De Franchis, dec. 330, n. 6, says "nec solus titulus facit ipsum reum," but the facts are not fully enough stated to enable one to judge of the value of the decision. Viscontus in his notes refers to Menoch. de Arbitr., book 1, qu. 82, who says in n. 6, "non titulus criminis sed qualitas poenae atque finis attenditur." So in Dynus, dec. 62, n. 22, referring to the distinction of "most atrocious" crimes: "cum titulus criminis poenam non alteret nec regulare faciat, sed probatio et verificatio contra qualitatem."

It would appear that it was the title of the crime, not of the case, that was in question; these authorities would show that the title of the crime, that is, the charge against the defendant, did not determine the nature or degree of the crime; that depended on the proofs. Mastrillus ad Indultum Generale, ch. 29, n. 19, is to this effect. As to the use of "titulus," see the forms of inquisition in Novellus Practica et Theorica, "Haec est inquisitio, titulus, seu forma inquisitionis."

Section 14.

[Bottini, Pam. 13, clxvii, 175, § His potius.]

These things having been noted beforehand, rather for completeness than by reason of any necessity demanding it for maintaining the justice of the decree[1] of this tribunal, it will be easy to overcome[2] the proof of the alleged adultery which has been brought forward by the counsel for the defense. For, so far as this proof is deduced from the other decree of this same tribunal condemning the Canon Caponsacchi[3] "for the elopement, and carnal knowledge of Francesca Pompilia," the answer already delivered still stands, that the title should not be regarded, but the proof appearing from the proceedings, and the punishment imposed by the sentence. And although in the decree, together with the title of "complicity in the elopement and seduction of the said Francesca Pompilia,"[4] there was added also the title of "carnal knowledge of the same," nevertheless since in the proceedings no proof is found in verification of this,[5] and the punishment of three years' relegation does not correspond with it, there remains consequently the bare title which should not be regarded, according to the authorities cited in my former answer, § Non relevante.[6]

[1] In the preceding sections of this argument Bottini discussed the dying declarations of Pompilia, and the decree of which he here speaks is the decree subjecting Guido and the others to torture.

[2] elidere. [3] decreto condemnatorio Canonici Caponsacchi. [4] "cum titulo complicitatis in fuga et deviationis Francescae," etc.; i.e., the title of complicity in the elopement, and of the seduction, etc., not, as Mr. Hodell translates, "complicity in the flight and escape of Francesca." [5] probatio illius verificativa. [6] CXCV, 200, the preceding section.

Section 15.

[Bottini, Pam. 13, clxvii, 175, § Eoque minus.]

And for the following reason, still less can there result from this decree such clear proof of the alleged adultery as is required to escape the ordinary penalty for vengeance taken after an interval, since at the instance of the Procurator of Charity,[1] a correction was decreed by my Lords the Judges with the approval of my most Illustrious Lord, by substituting a general title referring to the record of the proceedings,[2] namely: "Pro causa de qua in actis;" which correction, although it may not be read in the docket in which decrees are noted, commonly called the Vachetta,[3] yet it was made in the warrant[4] by which Caponsacchi was sent away to relegation, and in the decree assigning the home in place of a prison, Summary, Number 1.[5] And since this was made with the consent[6] of Abate Paolo Franceschini, it may therefore be asserted that the said change had become known to him, on account of his notorious responsibility[7] in conducting such a case,[8] so that it is absolutely improbable, that he had not personally examined such a decree, and the obligation executed by Pietro, for supplying her with food (without hope[9] of recovering payment) and the surety bond conditioned for her keeping her home as a prison; from which things his knowledge of the same ought to be considered as sufficiently proved.

Rota coram Bich. dec. 30, n. 30 et seq.; and coram Cels. dec. 152, n. 6; and coram Cerr. dec. 34, n. 40; and coram Alex. VIII of holy memory dec. 269, n. 11, and dec. 398, n. 11, par. 18, rec.

[1] ad instantiam Procuratoris Charitatis; not Procurator of the Poor as Mr. Hodell translates. It was Lamparelli who requested the change, see his argument, § Demum nullum, CCLV, 250, Ch. XII, sec. 24. [2] ad processum relativum. [3] in liberculo, in quo adnotantur resolutiones, vulgo Vachetta. Vachetta, "little cow," meaning a small leather-bound book, "the calf skin." [4] in schedula. [5] in the second summary of the Fisc, Pamphlet 11, no. 1, CLV, 159. [6] de consensu. [7] sollicitudinem; perhaps solicitude. [8] in huiusmodi causa. [9] probably on account of Guido's financial condition.

See on this point of the argument § Nec verum, ante sec. 4, and § Non autem praeterire, ante sec. 5 in Spreti's argument.

AUTHORITIES

These decisions of the Rota relate to the inference of knowledge from circumstances; in Cerrus dec. 34, n. 40, it was inferred from relationship and residence together.

SECTION 16.

[BOTTINI, PAM. 13, CLXVIII, 175, § EX INDEQUE CORRUIT.]

And in the next place, the answer falls to the ground that the decree could not have been changed because both sides were not heard; since, as Francesca Pompilia had not been given a hearing, for she had as yet not completed her defenses, much less could the title of "carnal knowledge" be included in the condemnation of the Canon, so far as it would prejudice her, not merely as to her reputation, but also as to the loss of her dowry, for which especially her husband's mouth was watering.[1] For in this way the woman would have suffered condemnation without having made her defense, and what is worse, as the event shows,

was left exposed to the fury of her husband. And therefore justice dictating it, such correction was deservedly granted and directed to be carried out;[2] and even if[3] this had not taken place, a sentence pronounced against the Canon could not injure her, as it was res inter alios acta; as, according to the Text in l. De unoquoque [Dig. 42, 1, 47], and in l. saepe ff. de re Judic. [Dig. 42, 1, 63], was declared by the Rota coram Dunoz. Jun. dec. 797, n. 4, and in Rec. dec. 392, n. 5, par. 18.

[1] maritus inhiabat: was gaping. [2] correctio merito impetrata et executioni demandata fuit; Mr. Hodell translates: "with justice was this correction requested and made." Cf. § Eoque minus, CLXVII, 175, above, sec. 15. [3] quatenus; see Glossary.

AUTHORITIES

Rec. Dec. par. 18, dec. 392, n. 5, apparently only affirms that a judgment in a suit inter alios acta does not prejudice a third party; of course, this is the general rule. The decision of the Rota Dunozetus Jun. dec. 797, is on a different point, the effect of an assertion of an interested party, the husband, in a case of alimony pendente lite in a suit for separation a thoro.

SECTION 17.

[BOTTINI, PAM. 13, CLXVIII, 176, § QUOD AUTEM MUTATIO.]

But that the change by its reference to the "Acta,"[1] means the same thing as the expression of the "carnal knowledge," is an altogether gratuitous assertion. For since several titles had been previously expressed in the decree of condemnation, to wit, complicity in the elopement, seduction,[2] and carnal knowledge, upon which the prosecution had been framed,[3] the expression of the "causa" contained in it is not applicable[4] to one rather than as to another, and certainly not to all, because if all had been intended to be included in the modifying decree,[5] this would have said: "*Pro causis de quibus*

in Processu;" since the singular number does not agree with more than one "causa," as is said by Surd. cons. 396, n. 9, book 3; Palm. Nep. alleg. 120, n. 6, book 2; Rota coram Greg. dec. 433, n. 7, and in Rec. dec. 252, n. 10, par. 19.

But [either] because[6] in the proceedings[7] the "causa" of carnal knowledge had not been verified,[8] or because the Canon could not be condemned for that, while Francesca Pompilia had not been heard and made her defense, — (because of the indivisibility[9] of the crime of adultery, which does not permit the splitting of the case by the condemnation of one party [while] the case is pending as to the other, and especially when all parties are present and held[10] in prison, as is advised by the Text in l. denunciasse, § fin. ff. de Adulter. [Dig. 48, 5, 18]; Alberic. on that passage, § quaeritur, n. 6, vers. Sed responderi potest, ff. ad leg. Jul. de Adulter; Salicet. in l. Reos. n. 1, vers. Hic vero, and n. 3, vers. Idem prodest, Cod. eodem titulo; Cyriac. contr. 354, n. 21; Cravett, cons. 206, n. 2; Origlia ad Campan. observ. ad resol. 24 and 25, n. 56 et seq.) — for these reasons the expression of the "causa de qua in Processu,"[11] should only be understood of the "complicity in the elopement," and of the "seduction"[12] (which latter could be separately disposed of[12] without the condemnation of Francesca Pompilia), but not of "carnal knowledge,"[13] since the reference should be considered as made only as to those things with which the relative arrangement [of the words] is consistent,[14] as the following authorities declare; Cravett. cons. 548, n. 21; Surd. cons. 431, n. 64; Menoch. cons. 420, n. 78, and cons. 399, n. 48; Altograd. cons. 48, n. 28, book 1; Rocc. disput. Jur. select. cap. 42, n. 40; Rota dec. 238, n. 4, par. 3, rec.

[1] per relationem ad acta; Mr. Hodell translates: "as regards the matter of the trial." Acta is nearly equivalent technically to our "record," and the proposed change in the decree was, as stated, "pro causa de qua in actis." [2] deviatio; which Mr. Hodell translates "running away." [3] constructus fuerat processus. [4] potius verificabilis: "capable of being identified with" seems to be the meaning. Mr. Hodell translates "more probable." [5] decreto reformatorio; Mr. Hodell translates "modified." [6] Mr. Hodell omits "because" and translates "vel" in the next line as "and." [7] in processu. [8] verificata; see Glossary. [9] individuitatem. [10] constituti. [11] expressio causae de qua in processu. Processus here as equivalent to acta. [12] expediri; literally disentangled; Mr. Hodell translates: "could be issued." [13] de complicitate carnali; for cognitione. [14] cum relatio facta censenda sit ad ea tantum, quibus dispositio relativa congruit; Mr. Hodell translates: "For the statements made should be considered applicable only to those matters with which the judgment relative thereto agrees." Bottini was forced to argue that complicity in the elopement, and the seduction, constituted one offense, at least his argument depends on that; but he says there were "plures tituli," which means more than two, and also "certe non de omnibus." It appears clearly from this section that there were three charges against Caponsacchi in the Processus Fugae, his complicity in Pompilia's elopement, his seduction of her, and the carnal knowledge.

AUTHORITIES

Surdus, cons. 396, n. 9, appears to be an erroneous reference. Rota Rec. Dec. 252, n. 10, par. 19: words in the singular number cannot include what seems more than one. Palma Nepos. Aleg. 120, n. 6: the singular number in contracts cannot be referred to the plural. Cravetta, cons. 206, n. 2, says the rule "res inter alios," etc., is of advantage to third parties, and that the acquittal of the adulterer helps the alleged adulteress, but his condemnation does not injure her. Origlia Observ. ad Campana Res. 24 and 25, n. 56, cites other authorities to same effect, applying the rule to the case of a mandant and mandatary; the latter being acquitted, the prosecution of the former will fail. Cyriacus, cont. 354, n. 21: the acquittal of the alleged adulterer is an absolute defense for the accused woman, but his condemnation does not injure her; this apparently is intended to apply to the case where the prosecutions are separate. In Mantua by ancient custom a joint prosecution may be brought and both condemned or acquitted together.

The final authorities are not important. Cravetta, cons. 548, and Menochius, cons. 420, are erroneous references. Surdus, cons. 431, n. 64, states generally in the Syllabus that a word of relation will not be understood to refer to all that precedes, where the same reason does not apply to all, but is different in some. Menochius, cons. 399, n. 48, and Rec. Dec. 238, n. 4, par. 3, to same effect in general.

Section 18.

[Bottini, Pam. 13, clxix, 176, § Idque manifestum.]

And this is rendered manifest by the lightness of the punishment to which the Canon was sentenced, namely, relegation for three years, which certainly does not correspond with the offense of seduction[1] of a married woman from her husband's home, and conducting her away[2] to the City, and carnal knowledge of her, seeing that — the aggravating circumstance of abduction being also removed from the case[3] (which is punishable with death unless an ecclesiastic is concerned) — a far severer penalty should have been inflicted for the adultery alone, if proof of it had appeared from the prosecution; as in accordance with the Text in cap. Si quis clericus dist. 81,[4] is held by Abb. in cap. Ut clericorum n. 8, de vita et honestate Cleric. [Decretal III, Tit. I, cap. 13]; Menoch. de arbitr. cas. 419, n. 60 [72]; Diaz. in Prax. Crim. canon. cap. 87 [79]; Decian. tractat. crim. book 6, cap. 23, n. 4; Bellett. disquis. Cleric. part 2, § 7 [§ 6], n. 3.

[1] non correspondet deviationi. [2] traductioni. [3] quoniam circumscripta etiam qualitate raptus capitali poena puniendi; Mr. Hodell translates: "For inasmuch as the attendant circumstance of rape, spoken about, is punishable by the capital penalty." Raptus is not rape, but the *forcible* abduction of a woman. Rapere est cum vi et impetu auferre aut abducere; Decianus Tract. Crim., lib. 8, cap. 7. Circumscripta may have here a technical meaning; circumscribere, to cancel, annul or set aside, abrogare et obliterare, see Glossary. [4] Decretum I, distinc. 81, ex concilio Aurel. "Si quis clericus adulterasse aut confessus aut convictus fuerit, depositus ab officio, communione concessa, in monasterio toto vitae suae tempore detrudatur."

This section is somewhat difficult. Deviatio and raptus are quite distinct, according as force is or is not employed; they correspond with the English seduction and abduction. The argument of Bottini is that if Caponsacchi had been found guilty of the crime charged, viz.: the cognitio carnalis, he would not have been

punished so lightly, even although the element of raptus did not enter into the case, but with the severer penalty of deposition from office and confinement in a monastery for life, as the authorities show which are here cited. It is possible that Bottini used the word raptus inaccurately in the sense of seduction or deviatio, meaning that the mere cognitio carnalis, aside from that aggravating circumstance, would have been more severely punished. Perhaps Bottini would have agreed with Privit Stanley Ortheris, one of the Three Musketeers: "Abdukshun or Sedukshun — no great odds."

AUTHORITIES

Menochius de Arbitr., cas. 419, recounts the punishment for adultery by the laws of different nations, and in n. 72 quotes the text of the Decretals as to clerks. In n. 73, he adds that the laity, men and women, are excommunicated, and the woman is shut up in a monastery for life or until her husband is willing to take her back. Decianus, Tract. crim., book 6, cap. 23, n. 14., to same effect, discussing also whether a clerk should be deposed or suspended. Diaz de Luca Pract. crim., ch. 79, does not approve the authorities favoring suspension of a clerk rather than deposition. Bellettus Disquis. clericalis, Part 2, § 6, n. 3, to same effect. From Part 2, § 5, n. 3, it would seem that the punishment for raptus was similar. As to a Canon's status, Bellettus says, Part 1, § 14, n. 3, that all canons are clerks just as he who is a man is an animal; but in Part 1, § 2, n. 28, he says a canon is not, strictly speaking, included among the clergy as clericus or clerus.

Caponsacchi, though he was not a "priest," but only a sub-deacon, was nevertheless bound to celibacy and continence, Decretum I, distinc. 32, chaps. 4, 7, 9, etc.

SECTION 19.

[BOTTINI, PAM. 13, CLXIX, 177, § AGNOSCIT D. MEUS.]

My lord the Advocate of the Poor acknowledges that the punishment was entirely disproportionate to the most rigorous expiation of the crime,[1] and especially after the renewal of the Sixtine constitution by Innocent XI of Sacred memory,[2] and therefore to avoid the defect of the said proof that might most rightfully[3] be argued from the lightness of the punishment, he attempts to answer, that the Canon was dealt with more mildly,

because he was a foreigner, and the question concerned a crime committed beyond the limits of the Ecclesiastical State, in which case he should be discharged with the sentence of exile[4] merely; but the answer is discovered to be without foundation[5] for many reasons.

[1] delicto accerime expiando. [2] The Bull of Sextus V, const. 46, 2 Mag. Bull 559, may be referred to, making adultery a capital crime. I cannot find any renewal of it by Innocent XI. [3] jure optimo. [4] exilio; often used generally for banishment or relegation. [5] insubsistens. The reference is to Spreti's argument, § In tantum, CXXVI, 134, ante sec. 11, where the lightness of the punishment is practically conceded. See also his later argument, § Quod vero, CCXXVIII, 230, ante sec. 10.

Section 20.

[Bottini, Pam. 13, CLXX, 177, § Primo quia.]

First, because of the well-known prerogative[1] of the City of Rome, which is the mother country of all men,[2] even those may be punished in it who have committed crime beyond the limits of the Ecclesiastical State, which is subject to the secular authority of the Pope, and indeed not for an asportation alone,[3] because that is lawful to any ruler, but for the crimes themselves; as according to the Text in l. Roma ff. ad municipal. [Dig. 50, 1, 33], is in terms affirmed by Oldrad. cons. 124 throughout; Marsil. cons. 99, n. 21; Petr. Barbos. in Tit. de Jud. ad l. secundam, § legatis n. 18 [28] et seq. [Commentary on Dig. 3, 1]; Castald. de Imper., qu. 77, n. 7 and 8; Boss. in tit. de for. competen. n. 75; and Cyrill. in Sum. Crim. tit. ubi de crimin. agi oport. n. 18, where he affirms that he had observed this in the year 1540 in the Capitoline Court;[4] Farinac. de Inquist., qu. 7, n. 12, vers. Haec quaestio, where he says that in this very

court in the year 1580 Georgius Corso was condemned to the galleys, who had committed homicide in Florence, and after he had killed the man, stole his horse and came to Rome,[5] notwithstanding that the case was very zealously defended in behalf of the accused. Boer. dec. 29, n. 7.

[1] ex notorio privilegio. [2] Patria communis; very frequently said of Rome. Cassiodorus Variae I, 39, calls Rome "everyone's country." [3] pro sola contrectatione; a technical phrase. Cf. § Quarto quod, CLXX, 178, post sec. 23. Mr. Hodell translates here, "not merely for the handling of criminals," and in § Quarto quod, post sec. 23, "not merely for his undertaking." See note below. [4] in foro Capitulino, for Capitolino; the court of the Governor of Rome. Cyrillus was then the latrunculator, in charge of prosecutions for robbery. The constitution of Paul V, No. 71, 3 Mag. Bull 261, 1611, contains a chapter de Capitolio et ejus officialibus. [5] et ablato equo occiso, Roman venerat; we should read occisi.

AUTHORITIES

Digest 50, 1, 33, Roma communis nostra patria est. De Marsiliis, cons. 99, n. 21; today according to the custom of all Italy in criminal cases, an arrested criminal is not extradited to the place where the crime was committed (non fiat remissio rei criminis capti ad locum commissi delicti). Bossius de foro competen, n. 75, quotes the Digest above. Farinacius, qu. 7, n. 12, cites the case as occurring in the Governor's court in Rome "in the present year 1580, in which Georgius Corso, who had committed a homicide in the Duchy of Florence had then, in order that he might escape more readily, stolen his horse from the man whom he had killed, and was captured in Rome. It was earnestly contended in behalf of the Fisc that he should be hung (furca suspenderetur) according to the aforesaid rule. But on the other side it was said that he could not in any way be punished for a crime committed elsewhere, as if he was a subject of Rome, neither by reason of the crime nor of his origin or domicil." Farinacius states that Corso was condemned, not to death but to the extraordinary punishment of the galleys, adding that this was the usual practice, "that all are punished, although they commit crime beyond the limits of the Ecclesiastical State, not, however, with the ordinary penalty, but extraordinarily, according to the discretion of the Judge." In Oldradus de Ponte, cons. 124, the request of the King of England for the extradition of an Englishman was refused in behalf of the Marshal of the Roman Curia. Barbosa ad l. secundam, § legatis, n. 28, Rome has "publicum judicium." According to Castaldus, qu. 77, Constantinople like Rome was "communis patria."

NOTE

Contrectatio, literally a touching or handling, is a technical term in the law of theft. Cf. Brissonius and Calvinus s. v.; contrectare est rem loco movere, and is said by Farinacius, qu. 173, n. 50, to be the removal of the thing from one place to another, in other words the removal is characteristic of the crime; and in subsequent sections lays it down that a thief can be punished in the place where he is caught with the stolen goods, by reason of this contrectatio or removal, although he did not commit the theft there. In qu. 7, n. 7, Farinacius further discusses the subject and in n. 8 says that a raptor can be punished wherever found, and like a vagabond has not the privilegium fori. The thought is that the removal or asportation indicates the criminal intent, and, we might say, shows conversion to one's own use. Here as applied to Caponsacchi's act, it was the taking Pompilia, Guido's wife, from Arezzo to Castelnuovo; as it were, stealing from him. Bottini argues that Caponsacchi was liable to punishment in the Ecclesiastical State as though he was a thief caught with the stolen goods. See § Quarto quod, CLXX, 178, post sec. 23: "non pro sola contrectatione;" and Albericus Gentilis, Hispanica Advocatio, B. I, ch. 6; translated in Classics of International Law. This discussion of Farinacius is as usual confused.

SECTION 21.

[BOTTINI, PAM. 13, CLXX, 177, § SECUNDO QUOD.]

Secondly, because this holds good more strongly whenever[1] the case concerns the punishment of crimes committed by ecclesiastical persons, who are subject to the jurisdiction of the Supreme Pontiff, and can be punished for them in the City [of Rome] with the ordinary penalty, although the crimes were committed beyond the limits of the temporal authority[2] [of the Pope], as the following authorities observe: Barbosa in Title cited de Judic. ad l. secundam, § legatis, n. 33 et seq.; Fagnan. in cap. licet n. 21, de for. compet., where it is said, "For Rome is the mother city of all men, and therefore in the Courts of Rome, any person, clerk or layman, may be brought to trial, although he did not commit the crime there," etc. Farinac. qu. 7, above cited, in n. 12.

[1] quoties. [2] extra ditionem temporalem.

AUTHORITIES

Barbosa ad l. secundam, § legatis, n. 33, does not appear to be in point.

SECTION 22.

[BOTTINI, PAM. 13, CLXX, 177, § TERTIO QUOD.]

Thirdly, because, since his coming to the City and his conducting[1] the wife thereto, are alleged to have been on account of his passion for her, and for the greater convenience of intercourse with her by taking her away from the home of her husband, certainly the Canon by such a purpose, would have subjected himself to penalties which could expiate the crime even when inflicted in the City, just as one remains liable[2] to the same penalties, if he lays his plans[3] for the crime in the City, although it is to be accomplished[4] beyond the limits of the State, as is held by Alciat. cons. 13, book 7; Clar. in Pract. crim. qu. 38, and qu. 39; Caball. resol. crim. Cas. 3, n. 7 et seq., where he says that in assigning jurisdiction to the Judge as to crimes that have been committed, the personality of him who commits the injury rather than that of the injured person is considered;[5] Pax. Jord. elucubi canon [Lucubrationes], vol. 3, book 13, tit. 8, n. 194 et seq.

[1] traductio. [2] obnoxius remanet. [3] tractans; plotting, or making arrangements. See Glossary. [4] perficiendum; brought to a conclusion. [5] potius persona offendens quam offensa; Mr. Hodell translates: "the person offending rather than the offense, should be considered."

AUTHORITIES

Clarus, Book 5, § Fin., qu. 38 and 39, contains an elaborate discussion of this subject; followed by Caballus in the passage cited. Pax Jordanus, 3, 13, 8, n. 194: in case of a crime begun in one place and completed in another the criminal may be punished in either; he adds that the authorities are not fully in accord, and concludes that as a general rule the offense should be punished where it is consummated and where the injured person is.

SECTION 23.

[BOTTINI, PAM. 13, CLXX, 178, § QUARTO QUOD.]

Fourthly, because the alleged carnal knowledge (so far as it can be said to have been proved in the prosecution and by reference thereto concerning it, the decree as amended can be verified)[1] took place in the Ecclesiastical State, since the strongest proof of it is drawn from the asserted sleeping together in the same bedroom[2] in the inn at Castelnuovo, according to the Text in cap. Literis de praesumpt. [Decretals II, Tit. 23, cap. 12] and other authorities cited by the Procurator of the Poor in § Sed profecto.[3] And therefore the Canon could and should have been punished with the appropriate penalty not merely for the asportation of Pompilia,[4] but for the adultery, if it had been proved. And since such penalty was not imposed,— unless you wish also to contradict the justice of the said decree as inflicting too mild a punishment, and one only suitable[5] to a mere seduction[6] and complicity in the elopement, and greatly moderated by the excuses alleged by the Procurator of Charity[7] — it may be therefore asserted that the Canon was in no respect condemned for the alleged carnal knowledge, for the nature of the punishment clearly proves the nature of the crime to which it ought to be commensurate, according to that passage in Deuteronomy ch. 25, "According to the measure of the sin shall be the manner of the stripes," and it is so held by Caball. cas. 31, n. 19, and cas. 145, n. 5; Chartar. dec. crim. 50, n. 5 and dec. 70, n. 3 and dec. 66, n. 86.

[1] per relationem ad illum (i.e., processum, the record of the prosecution) de ipsa (i.e., the cognitio carnalis) verificari valeret decretum reformatum. [2] in eadem cella. [3] CXI, 119, Ch. VI,

sec. 22. [4] pro sola contrectatione. See note § Primo quia, ante sec. 20. [5] adaptabilem. [6] deviationi. [7] Lamparelli; Mr. Hodell translates: Procurator of the Poor.

AUTHORITIES

Caballus, cas. 31; cas. 145, and Chartarius repeat the general statements in the authorities.

SECTION 24.

[BOTTINI, PAM. 13, CLXXI, 178, § EXCLUSA ITAQUE.]

And therefore since the alleged condemnation of the Canon for carnal knowledge of Francesca Pompilia is excluded, there also falls to the ground the alleged notoriety[1] of the adultery which results from it — and yet this cannot be even alleged against her as she was not defended [against the charge]. And just as the public vengeance which is to be decreed by a Judge cannot be legally based upon it, so much less can private vengeance be considered excusable, which is taken by the husband by means of her murder[2] after an interval. He is only exempt from the ordinary penalty, according to the milder opinion, when the adultery is manifest by the clearest proofs certified by the Lord Judges in her confession,[3] or by sentence entered [by them] upon her.[4]

[1] notorietas. [2] sumpta cum ejusdem nece. [3] per liquidissimas probationes de adulterio constat a D.D. exemplificatas in confessione; Mr. Hodell translates: "displayed in confession by the accused," a D.D. for a Dominibus, in the plural. Note here the requirement of the law that confessions must be certified by the Judges present. [4] super illo, for illa; or perhaps illo refers to adulterio. The meaning is the same.

SECTION 25.

[BOTTINI, PAM. 13, CLXXI, 178, § PROUT ETIAM.]

Just so, also, it would be superfluous to destroy the presumptions adduced by counsel for the

defense, especially by my lord the Procurator of the Poor, in order to overthrow the proof of adultery proceeding from them, for this single answer would be enough, that they were all heaped together in the prosecution "for elopement and seduction,"[1] framed at the instance of Count Guido, who was urging it on at the very time to gain the dowry because of [Pompilia's] adultery, and it was pressed[2] by counsel for the Fisc,[3] who then wrote a zealous argument based upon these presumptions; and yet in their report of the case,[4] the Judges did not take these presumptions into consideration on account of their irrelevance,[5] as is evident from the lightness of the penalty decreed against the Canon. And so the examination of these cannot be renewed now, after the Fisc has given up and has acquiesced in the decree[6] from which it might have appealed, if it considered itself wronged, nor was it lawful for [Guido] to rush to barbarous vengeance by his own act.[7] Nevertheless, that I may leave nothing untouched, and assert the justice of the decree more clearly, I have thought it worth while to take it upon myself briefly to refute them.

[1] super fuga et deviatione. [2] institum; probably a misprint for instatum or institutum? [3] It must be borne in mind that in the "Prosecution for flight" the Fisc, perhaps represented by Bottini himself, was trying to show Pompilia's guilt. [4] in relatione causa. [5] irrelevantiam. [6] adhaerens sententiae acquievit; see Glossary. [7] immanem facti vindictam: vengeance in fact as distinguished from vengeance in law. [8] Bottini then proceeds in the remainder of his argument to show Pompilia's innocence in fact.

AUTHORITIES

As to the right of the Fisc to appeal, see Franc. dec. 467 fin.; Pont. de Potestate Reg. de elect. official., § 1, n. 53; Capyc. Latro dec. 78, n. 10; Guazzinus Def. 36, cap. 14, n. 2.

CHAPTER VIII

THE ARGUMENTS AS TO GUIDO'S RIGHT TO TAKE VENGEANCE "EX INTERVALLO"

A

ARGUMENT FOR GUIDO

Pompilia having been guilty of infidelity, Guido as her husband was so far justified in killing her that he should not be punished with death.

1. The laws of every country and age are indulgent to husbands who take revenge for their dishonor. Such was the law of ancient Greece and Rome, according to the laws of Solon and the laws of Romulus and the Twelve Tables. Section 1

2. This is also true of the modern law, and the reason given in the lex Julia de Adulteriis is that it is very difficult to restrain one's just resentment, and a husband who kills his guilty wife is free from the penalty of the lex Cornelia de Sicariis, according to many authorities. 3

3. Indeed, as Cassiodorus shows, even the brutes will avenge themselves; so that a husband who does not avenge his honor is more insensible than the beasts. 7

AA

REPLY TO THE ARGUMENT OF THE FISC

NOTE. The logical arrangement of this branch of the argument has been attended with unusual difficulty, as many sections refer to more than one proposition, and might with almost equal propriety be otherwise classified.

I

This excuse is sufficient to mitigate the penalty even if the husband kills his adulterous wife after an interval, notwithstanding the authorities relied upon by the Fisc, which apply in terms to the case of a wife detected in her guilt and killed immediately. General discussion of the law, especially the opinions of Farinacius, Raynaldus, Matthaeu et Sanz, Caballus, and the l. Divus Adrianus. Section 10

And in particular: —

II

a. "Detection" in the act includes the case where the adultery is manifest, or the wife is convicted. 29

b. Indeed suspicion is enough. 32

III

a. Injury to honor is always fresh, and vengeance therefor is always "immediate." 35

b. Injury to honor being "real" and not merely "personal," vengeance is always "immediate." 39

c. The remedy by divorce having been abrogated, it follows that vengeance may be taken at any time. 41

		Section
d.	The offense to honor being permanent, the remedy by vengeance is also lasting, just as in cases of self-defense.	46
	IV	
a.	Therefore vengeance on account of injured honor is said to be taken "immediately" when it is taken "as soon as possible." Here it was physically impossible, and Guido was justified in his temporary recourse to vengeance by law.	48
b.	And Pompilia's return to her parents' home caused fresh exasperation to Guido.	57
c.	The injured husband who takes vengeance by law is subject to ridicule even from the Court, and Guido was justified in taking the law into his own hands.	61
	V	
a.	Guido moreover had a right to accomplish his vengeance by taking helpers.	62
b.	And might even pay them money.	64
c.	And according to his first examination his instructions to his associates were to disfigure Pompilia and not to kill her. Their accusation of him was, under the authorities, invalid.	66
	VI	
	Peroration in behalf of Guido.	69

Section 1.

[Arch., Pam. 1, x, 12, § Magnum quidem.]

Great indeed is his crime,[1] but one very greatly to be pitied, and most worthy of excuse, to which the severest[2] laws are indulgent; — and they show themselves very mild towards husbands who wipe out the stain of their dishonor with the blood of their adulterous wives. l. Si adulterium cum incoestu 38, § Imperatores ff. ad leg. Jul. de Adult. [Dig. 48, 5, 39, 8]; l. marito 24, ff. eod. [Dig. 48, 5, 24]; leg. Gracchus C. eod. [Cod. 8, 8, 4]; leg. 1, § Fin. ad leg. Cornel. de Sycar. [Dig. 48, 8, 5]; l. si quis in gravi 3, § Si tamen maritus ff. ad Syllan. [Dig. 29, 5, 3, 3]; Clar., § Homicidium, n. 49; Giurb. cons. 86, n. 9; Berlich. pract. conclus., § 4 [Book 4], conclus. 37 [27], n. 152; Caball. resol. crim. cas. 300, n. 5; Farinac. qu. 121, n. 63.

[1] Guido's lawyers never claimed that he should not be punished; they admitted that he had committed a serious crime and should be severely punished, but not capitally. [2] Referring to the laws of Solon, cited in the next section.

Authorities

These citations are important. Clarus, lib. 5, § Homicidium, n. 49, says: "But what should be said in the case of a husband, whether he shall be permitted to kill with impunity an adulterer detected with his wife? I answer, if the adulterer be a common person, then the husband in his own house, but not elsewhere, may kill and escape punishment, according to the text in l. marito ff. de adult. But if the adulterer be not a common person the husband may not kill him without punishment; but it is very true that if the husband kill him he is not punished with death, on account of his just resentment, but more leniently; for if he is a man of low degree he is sentenced to the mines, but if he is of higher rank, he is banished to an island; so says the text in l. Si adulterium cum incestu, § Imperat. ff. de adult.; or he is sent into exile, l. Gracchus C. eo tit. de adult. And although some say that in no case can a husband kill the adulterer detected with his wife, yet the common opinion of jurists (legistae, i.e., teachers or students of the law, DuCange) is that he may, according to the aforesaid statement, as Parisius affirms, cons. 154, n. 12, lib. 4. And so Socinus Jr., advised, cons 34, lib. 2, in an actual case."

The foregoing concern only the killing of the adulterer. The other authorities extend the doctrine to the case of the wife. Giurba, cons. 86, n. 9: "In the third place, a husband who kills his adulterous wife is not to be punished with death; l. si adulterium, § Imperatores ff. de adult.; l. si quis in gravi, § si maritus ff. de adult. Caball. crim. resol., cas. 300, n. 14, 18, and 26; Bellon. de his quae fiunt incontin., c. 9, n. 3; Marta Vot., 206, n. 3; or the adulterer after an interval, Caball. de omn. gener. homicid., n. 43, and said cas. 300, n. 24, 28; or a young man found with the wife in a suspicious place, Caball. de omn. gen. homic. n. 45."

Berlichius Pract. conclus., book 4, conclus. 27, n. 152: "But it is to be understood that a husband may kill his wife, and a father may kill his daughter who is detected in adultery, as is laid down fully and wisely with its extensions and limitations by Farinacius, qu. 121, n. 1. etc." (citing other authorities). Caballus Res. Crim., cas. 300, is often referred to in the O. Y. B., but his discussion of the question is lengthy and I shall therefore condense it. "There are nevertheless cases in which the husband is permitted not merely to chastise, but even to kill his wife, for if the husband detects his wife in adultery and kills her he is not liable to the punishment of parricidium under the lex Pompeia, nor to that of homicide under the lex Cornelia, according to the law si adulterium, § Imperatores * * * For the husband sustains a very great injury by reason of his wife's adultery * * and a greater injury than is caused by the death of a son, as I have previously shown * * which injury he could avenge by the legal method of prosecuting her and causing her to lose her dower and to be otherwise punished, * * yet if he does not avenge the wrong by the legal method but kills her by his own hand he is not punished with death. * * For whenever any one commits crime under the influence of just resentment, the punishment ought to be moderated, hence a husband, who deservedly kills his wife when detected in adultery, ought to be punished more mildly * * And since we are dealing with a matter in which a legal complaint is not customarily laid before a Judge except by common and feeble folk who do not mind exposing their shame before the public,— and besides no little shame would attend them according to the popular judgment because they would be considered common and horned, who would not avenge themselves with their own hands, but wait to be avenged by a judgment of the court, especially because the judges are not accustomed to give judgment about such things but to mock him and laugh and roar,— certainly the husband had a just excuse if he did not make recourse to the Judge but determined, upon his own authority, to repel and drive away the injury which he could not suffer without great shame, and therefore he deservedly escapes the ordinary punishment." (See on this point § Et haec nostra, XXXL, 32, post sec. 25.)

Farinacius, qu. 121, n. 63, also supports the statement: "If a husband kills his adulterous wife, although he cannot do this without punishment, yet he is punished more mildly." Farinacius quotes the reason given by Tiraquellus that a husband sustains greater suffering from

the adultery of a wife than from her death, or that of his children, or even if he suffers wounds on his own person.

Section 2.

[Arch., Pam. 1, x, 12, § Quod idem sancitum.]

This same thing had been enacted in the laws of the Athenians and of Solon, that is, of the wisest legislators, and what is more, in that rude age of Romulus, Law 15, "The husband and his cognates may kill at their pleasure, his wife when convicted of adultery," as is stated by Balduin. Piccard. in § Item lex Julia de Adulteriis, n. 3, Instit. de Public. Judic.; and likewise in the laws of the Twelve Tables as is stated by Aulus Gellius, Noct. Act. lib. 10, cap. 23; Tiraquell. ad leg. Connub. 15 [1], n. 3; Covar. in Epitom. Decretal. lib. 4, part 2, cap. 7, § 7, in the beginning and n. 1; Ameseva [Amescua] de potest. in se ipsum, cap. 13, n. 12, at the end; Matthaeu de re crim. cont. 11, n. 8.

Authorities

Tiraquellus ad leg. Connub. 1, n. 13, gives the law of Romulus in the words of the text: "Adulterii convictam vir et cognati, uti volent, necanto." See also Tiraquellus 13, n. 13. And so Balduinus in Jurisprudentia (collected Ed. of 1738), vol. 1, p. 28, and Pardulphus Parteius in 4 Thesaurus Juris Romani 444. Matthaeu et Sanz also quotes the law on the authority of Balduinus. Aulus Gellius book 10, ch. 23 (Beloe's trans. ii, 259), quotes Marcus Cato's oration De Dote, but not the XII Tables. Covarruvias Epitome, part 2, ch. 7, § 7, cites the old law before the Lex Julia and quotes the XII Tables: "Moechum in adulterio deprehensum necato." The references to the XII Tables may be found in Johannes Rosinus, Antiquitates Romanae, 561; Franciscus Balduinus, Opuscula Omnia, Oldendorpius, Variae Lectiones; Jacobus Gothofredus in 3 Thesaurus Juris Romani, 1; Theodorus Marcilius in 4 Thesaurus 217; Pardulphus Parteius in 4 Thesaurus 381, who reconstruct them. See on this subject Westermarck, Origin etc., of Moral Ideas, vol. I, 290, and vol. II, 447. As to Leges Draconis, law 7, and Leges Solonis, law 80, see Pardulphus Parteius 4 Thesaurus 394, 434.

Didacus Covarruvias, b. 1512, d. 1577, was a judge at Burgos, Arch-Bishop of San Domingo, afterwards Bishop of Segovia and Cuença,

and president of the council of Castille. He was reputed to be the Bartolus of Spain, and Matthaeu et Sanz styles him "toto orbe doctrina celeberrimus," cont. 25, n. 17.

Section 3.

[Spreti, Pam. 2, xxv, 27, § Hoc stante.]

This being established,[1] we can safely assert that even if the said Count Guido had confessed that he killed his said wife with the complicity and aid of Blasio Augustinelli of the town of Populo, Domenico Gambassini[2] of Florence, Francesco Pasquini of Castle Monte Acuto, and Allessandro Baldeschi of Tiferno,[3] he should not therefore be punishable[4] with the ordinary penalty [of death], but more mildly in accordance with the rescript of the Deified Pius, reported by the Jurisconsult Ulpianus in l. Si adulterium 38, § Imperatores ff. ad leg. Cornel. de Adulter.;[5] and likewise by the Jurisconsult Martianus in l. prima, § fin. ff. ad Jul. de Sicar.[6] For in both places it is said that a man born in humble station[7] is banished in perpetual exile, but that a nobleman is banished[8] for a time, since indeed excuse is made for a husband who then avenges his just resentment, with which Ulpianus agrees in l. si quis in gravi, § si quis moriens, in fine ff. ad Sen. Consult. Syllan. [Dig. 29, 5, 3, 1], "Since it is most difficult to restrain such resentment," as it is said in said l. Si adulterium cum incoestu 38, § Imperatores ff. ad leg. Jul. de Adulter. [Dig. 48, 5, 39 (38), 8].[9]

[1] hoc stante; i.e., Pompilia's adultery, as stated in § Ex processu, xxv, 27, Ch. VI, sec. 5. [2] The MS. note in the margin of the O. Y. B. seems unintelligible. [3] See as to names of the Socii, Ch. XI, preface. [4] veniret puniendus: "should come to be punishable." [5] leg. Cornel. de Adult; error for leg. Julia. This section, however, is from Papinianus not Ulpianus. [6] ad Jul. de Sicar;

error for leg. Cornel. de Sicariis, Dig. 48, 8, 1, 5. [7] humili loco natus. [8] relegatur. [9] This section of Spreti's argument is referred to by Bottini, § Dixi nil, CLXIV, 172, post sec. 82.

Section 4.

[Spreti, Pam. 2, xxv, 27, § Et ita conciliando.][1]

And so in harmonizing the incongruity of the law,[2] nec in ea 22 ff. eodem Tit. [ad Jul. de Adulter, Dig. 48, 5, 23] it is well explained by the Gloss thereon, on the word *omnem* and on said l. prima, § fin. on the word *Rescripsit*, vers. Sed videtur ff. ad leg. Cornel. de Sicar [Dig. 48, 8, 15], and on said l. si quis in gravi, § Si quis moriens, on the word *ignoscitur*, ff. ad S.C. Silaniano [Dig. 29, 5, 3, 1]; and the authorities have very generally so held, especially: Alberic. Rayner., and other writers upon the l. Gracchus. Cod. ad leg. Jul. de Adultr.; Angel. on said l. Si adulterium cum incoestu, § Imperatores n. primo, and 2 ff. eodem; Paris. cons. 154, n. 1 and 2, lib. 4; Giurba cons. 86, n. 9; Soccin. Jun. cons. 34, n. 5 et seq., lib. 2; Bertazzol. cons. Crimin. cons. 42, n. 1; Tiraq. leg. Connub. 12, sub n. 3; Angel. de Malef. in verbo Chi hai adulterato la mia Donna, vers. Advertas tamen, page of my book 118 reverse; Nevizan. Silv. Nuptial. lib. 1, verbo, Non est nubendum, n. 93 etc.; Gomez. ad leg. Tauri, 80, n. 51, vers. Unum tamen est; Decian. tract. Crim. lib. 9, cap. 15, n. 38; Menoch. de Arbitr. cas. 356, n. 89; Foller. Pract. Crim. verb. Dentur Capitula, quod suffocavit uxorem, n. 63, fol. 280; Farinac. qu. 121, n. 59 and 60; and very much at large, Caball. Resol. Crim. cas. 300, n. 5, and many sections following; Matthaeu de re Crim. contro. 11, n. 8; Donde. consult. 97, n. 1 and 2; Sanfelic. decis. 337, n. 9;

Dexart. citing very many others in decis. Sardin. 57 throughout.

[1] This section is omitted by Mr. Hodell. [2] Et ita conciliando Antonomiam, etc.; misprint for antinomiam, in English antinomy, here meaning legum contrarietas, a contradiction or inconsistency in laws. See Calvinus s.v.; and for such use of the word, see Matthaeu et Sanz de re Crim. cont. 55, n. 18. Fontana contains a list of treatises on Antinomiae.

AUTHORITIES

The law Imperatores is apparently opposed to the law Nec in ea: "Therefore, however, a father, but not the husband, is permitted to kill the woman and every (omnem) adulterer, because generally paternal duty takes good counsel for his children," (i.e., as the Gloss says that he may not kill her), "but the violent passion of a husband who readily judges, should be curbed." The Gloss cited on this passage is, "but certainly it seems that the husband may kill his wife," and refers to § Imperatores and other citations. The passage from the leg. Cornel. de Sicar., Dig. 48, 8, 1, 5, is to the effect that the punishment is to be moderated for a husband who kills his wife taken in adultery, and the Gloss refers to § Imperatores and adds "Sed videtur in nihilum." The reference to Sen. Consult. Silan. should be to § Si tamen maritus.

The long list of references following includes most of the principal authorities, again cited in the course of the argument. Many refer to homicides committed immediately and upon detection, and are therefore more relevant in the following division of the argument. They are referred to here by way of introduction to show the indulgence extended by the law in such cases of homicide by reason of the intense provocation of a husband who is actuated by just resentment. Parisius, book 4, cons. 154, n. 1 and 2, merely refers to the ancient law of Rome. Giurba, cons. 86, n. 9, is cited before. The case from Bertazzolius is an important authority; Spreti refers to it, § Nec verum est, XXVI, 28, post sec. 12. Tiraquellus leg. Connub. 12, n. 3, is probably 13, n. 6. Angelus de Maleficiis says that in such a case the lex Cornelia de Sicar. does not apply on account of the husband's just resentment, but the husband is exiled, etc. Nevizanus collects many authorities in Non est nubendum, n. 93. Gomezius ad leges Tauri 80, n. 51, answers the question, "An et quando maritus possit propria authoritate interficere adulteros," concluding, in vers. Unum tamen est, that the husband is not punishable with death but a milder penalty, because it is most difficult to control his just resentment. Decianus Tract. Crim., book 9, ch. 15, and Menochius de Arbitriis, cas. 356, merely collect the authorities. Farinacius, qu. 121, and Caballus, cas. 300, have been already cited. Matthaeu et Sanz contr. 11, is one of the important cases, stated fully in the Appendix. The section here cited from Sanfelicius, dec. 337, lays down the general principle; this case is often cited. Socinus Jr., cons. 34, n. 5, a high authority, says the law is clear that a husband who

kills his wife or her adulterer in these circumstances is not to be punished capitally but is to be excused on account of his just resentment, and that a noble is to be relegated for a time, if indeed the husband should not be excused altogether. Follerius, Dentur Capitula, n. 63, says that if the husband kills in the act he is to be punished with a milder penalty than death.

Section 5.

[Spreti, Pam. 9, cxxxvi, 142, § Et in his praecisis.]

And that in the exact circumstances of this case,[1] namely, that one who kills his adulterous wife after an interval, is excused by reason of his just resentment, which causes him not to be in the fullness of his intellect, is affirmed preëminently by Carer.[2] in pract. crim. tract. 3 de homicid. § Sexto, igitur excusat justus dolor n. 4, page 160 (reverse); Gomez. ad l. Tauri 80, n. 58; vers. Item homo; Matthaeu de re crimin. cont. 12, n. 14.

[1] in his praecisis terminis. [2] prae ceteris.

Authorities

Gomezius ad leg. Tauri. 80, n. 58, "because a man instigated by intense resentment is not in the fullness of his intellect." But Gomezius seems to hold the contrary opinion in case of homicide committed ex intervallo. See § Nec verum est, vers. Novar. in Summ. xxviii, 29, post sec. 31. Matthaeu et Sanz cont. 12, is the case of Franciscus Palomeque, see Appendix 3. In n. 14 he cites this passage from Gomezius. Giurba, cons. 86, n. 8, says the same. Carerius Prac. Tract. de homicidio, § Sexto, etc., supports the text. The argument is more fully stated in subsequent sections.

Section 6.

[Spreti, Pam. 9, cxxxvii, 142, § Inquit enim.]

For Ulpian says in l. mariti 29, in princip. ff. ad l. Juliam de adult. [Dig. 48, 5, 30 (29)], "for he should have been enraged also at his wife who had violated her marital duty." That moreover his anger

should be caused by the insult that he received, and that his nature should in this way revolt, so that he should repel that [insult][1] in whatever way he can, is well observed by Zacch. qq. Medicoleg. lib. 2, tit. 1, qu. 6, n. 26, and the sections following, since it is more difficult to restrain one's anger than to perform miracles, as Saint Gregory says, Dial. 1; and as Bossius observes, tit. de homic. n. 60; Vermigl. cons. 26, n. 7, and cons. 43, n. 3.

[1] Mr. Hodell translates: "so that he would drive *her* from himself." "illam" in the text refers to "contumeliam."

AUTHORITIES

Ulpian in l. mariti, see translation of the text in Appendix. Zacchias in the citation from Quaestiones Medico-Legales discusses the question "whether he who offends in anger ought to be excused from his fault," and refers to § Imperatores and the Gloss on l. Gracchus. His words as quoted are "Quam (contumeliam) Natura eo motu insurgit, ut a se depellat, quocumque modo potest etiam malum pro malo rependens." Bossius Homicid., n. 60, quotes St. Gregory, as does Vermigliolus, cons. 26, n. 7; cons. 43, n. 3, cases of unpremeditated homicide committed in anger. Paulus Zacchias, the Proto-Medicus Generalis of the entire Ecclesiastical State, wrote the Questiones Medico-Legales, the best edition of which is by Daniel Horstius, Nuremberg 1726, and Venice 1737. This was the standard authority on the subject, and all the later works on Legal Medicine and Medical Jurisprudence are indebted to it directly or indirectly.

SECTION 7.

[SPRETI, PAM. 2, XXVII, 28, § NEC VERUM EST; VERS. MATTH. DE RE CRIM.]

[And so also] Matthaeu de re Crim. contro. 12, from n. 7 to 17, and n. 21, where he says that almost all the tribunals of the world observe this rule; and in the sections following, as far as the end, and de Regimin. Reg. Valent. cap. 8, § 8, n. 65, where he says it was so adjudged by the Royal Senate, and in the following sections as far as 70, where under n. 69, he quotes the beautiful language of Theodoricus, as found in Cassiodorus lib. 1, variar.

Epistol. 37, where we read: — "For who could bear to drag into court a man who has attempted to violate his rights as a husband? It is implanted by Nature in the wild beasts to defend their mating with deadly conflict, since what is condemned by natural law is hateful to all living creatures. We see the bulls defending their cows by battling with their horns; the rams fiercely fighting with their heads[1] for their ewes;[2] the stallions making claim with kicks and bites, to the mares who belong to them; so that these animals lay down their lives for their mates, although they are not affected by shame.[3] How then can a man endure to leave adultery unavenged which he knows has been committed to his everlasting disgrace? And therefore if you are entirely truthful in the petition that you have presented[4] and have washed away the pollution of your marriage bed with the blood of the adulterers taken in the act, and are pleading your cause[5] not as under the pretext of a blood-thirsty intent, but by reason of your shame, we direct that you shall be freed from the exile[6] which it appears was imposed upon you; since for husbands to use the sword for the love of their honor, is not to trample upon the laws, but to establish them."

[1] Arietes pro suis ovibus capitaliter insaevire; very Gothic Latin. [2] Mr. Hodell translates "pro suis ovibus" as "for their wethers," but as a wether is aries castratus, this would be strange conduct on the part of the Gothic rams. The translation by the feminine word would seem preferable. [3] i.e., although animals are not affected by shame as men are; pro copulatis sibi animas ponunt is certainly a peculiar expression. [4] si oblatae petitionis minime veritate fraudaris; not "very little false statements," but none at all, i.e., "if you are telling the exact truth in your petition." [5] sed causa pudoris intendis; ab exilio, etc. The punctuation in the O. Y. B. is wrong, there should be a semicolon after intendis; the words "ab exilio" qualifying the next sentence. Intendere, I take here

to be used in the sense of judicio contendere, litigare, to maintain a suit. See DuCange, Calvinus. [6] ab exilio * * te praecipimus alienum; released, freed, exempt. For this use see DuCange.

This difficult passage is an extract from a rescript of Theodoric the Gothic King of Italy, addressed to one Crispianus, who had been exiled for a homicide committed in the stated circumstances. Whether he killed both offenders, or the adulterer only, does not clearly appear in the text, which is probably corrupt in several places. The words are maculam adulterii sanguine diluisti; the marginal gloss on Marito, Dig. 48, 5, 24, Ad. leg. Jul. de Adult., after citing the laws of Romulus, Solon, etc., mentions this "elegant decision" of King Theodoric apud Cassiodorum, "qua remittitur poena exilii ei qui *ambos* occiderat." This, however, appears to me to be doubtful.

M. Aurelius Cassiodorus, born about A.D. 480, died about 575, was the Chancellor of Theodoric, also at times Senator of Ravenna and Consul of Rome. When about sixty years of age he entered religion and founded the monasteries of Scyllacium. In his official capacity as Royal Chancellor he composed many decrees and rescripts for the King, which with other matters he collected in the twelve books Epistolarum Variarum. Among his other voluminous works are a Commentary on the Psalms (which seems rather stodgy and is not recommended), and the Edictum Theodorici. The Epistolae Variae, written in an inflated and affected style (of which the author appears to have been very proud) have been ably edited by Thomas Hodgkin in an interesting volume, The Letters of Cassiodorus (London, 1886), where, however, only a very condensed and free epitome of this letter (Book 1, n. 37) is given. Cassiodorus was something of a grammarian and was fond of using words in a peculiar or artificial meaning, which makes his letters very difficult to read, though they contain much of interest to the student of the later Latin language. They appealed strongly to the medieval taste and this passage was considered especially fine, being often quoted in the legal treatises and decisions.

Section 8.

[Spreti, Pam. 9, cxxxvii, 142, § Alii vero Doctores.]

The other authorities indeed, who speak of persons committing homicide in their own defense, with prohibited arms and in prison, should likewise support us,[1] because the defense of one's own honor is by men of good birth, especially nobles,

considered not merely the equivalent of life,[2] l. justa ff. de manum. vend. [Dig. 40, 2, 9], but is preferred even to life itself according to the words of the Apostle, Epist. 1 to the Corinthians, ch. 9 [vers. 15]: "Expedit mihi magis mori, quam ut gloriam meam quis evacuet," [for it were better for me to die, than that any man should make my glorying void]. And Saint Ambrose, book 3, officiorum ch. 4: "For who does not consider an injury to the body, or the loss of one's inheritance of less importance than injury to the spirit or the loss of reputation?" And Marcus Tullius, Philippic. 3: "We are born to virtue and liberty, let us either retain them or die with honor." Menoch. cons. 96, n. 15, and cons. 98, n. 8; Valenz. cons. 92, n. 1, as far as 7; Prat. respons. crim. 25, n. 29, and several sections following; Joseph Mele in additions to Gizzarel. decis. 18, n. 6 et seq. And in such a case as this: Bertazzol. cons. 42, n. 6; Dond. consult. 97, n. 8 and 9; Sanfelic. dec. 337, or in the argument of an Advocate printed therewith, n. 34 et seq; Panimoll. decis. 86, n. 23, et seq.

[1] suffragari. [2] nedum vitae aequiparatur; Mr. Hodell translates: "is to be likened to the defense of life itself."

AUTHORITIES

Valenzuela Velasquez, cons. 92, collects the authorities with a full hand. Bertazzolius, dec. 42, the case of Joannes Maria who killed his adulterous wife causa honoris; and Dondeus, cons. 97, n. 8, a similar case, both frequently cited. Menochius, cons. 96, n. 15, quotes St. Paul. Panimolla, dec. 86, n. 23; to the effect that the punishment should be mitigated for a crime committed in anger by reason of an insult to honor, especially where the revocation, that is an apology for the insult, will not atone.

Norfolk: Mine honour is my life; both grow in one;
Take honour from me, and my life is done;
Then, dear my liege, mine honour let me try;
In that I live, and for that will I die.

K. Richard II, Act I, Scene 1

Section 9.

[Spreti, Pam. 9, cxxxvii, 142, § Adeo ut qui.]

So true is this that he who disregards his own honor, and takes no care to recover it by revenging himself, differs in no respect from the beasts, Gizzarell. in said decis. 18, n. 5; Caldero dec. 42, sub num. 35; and other [authorities] of those recently cited.[1] Nay, he should be considered even more senseless than the very beasts according to the golden words of Theodoric in Cassiodorus, Book 1, Var. Epist. 37, which we quoted in our former argument, § Nec verum est, after the middle of the section;[2] Bertazzol. in said cons. 42, n. 9, vers. Et si non est plusquam Bestia.

[1] in § Alii vero, preceding section. [2] in § Nec Verum, xxvii, 28, vers. Matth. de re Crim., ante sec. 7.

Authorities

Caldero, dec. 42, n. 35, recites the decision of Gizzarellus that a homicide in revenge for a slap in the face received four years before, may be considered as committed incontinenti, and not to be punished with death, because if men do not consider their honor they are no different from beasts. It appears from the report in Gizzarellus, dec. 18, that the judgment was by a majority of the court. Bertazzolius, cons. 42, n. 9: "But no one doubts that although the husband do not find his wife in flagranti, yet if he inquire and convict her of adultery, he has a just and great resentment, if he cares anything for his honor and even if he is no more than a beast, because he has sustained an injury."

Section 10.

[Arch., Pam. 1, xi, 13, § Quibus praehabitis.]

Now if these things are granted,[1] the opinion of certain authorities does not stand in our way, who assert that a husband is not to be excused[2] from the ordinary penalty, who kills his adulterous wife after an interval, their argument being that[3] the aforesaid laws[4] speak of a wife who has been found

in the act of crime, and so [has been killed] immediately; and that they should not be extended in like manner to an uxoricide committed after an interval, because as they say,[3] the reins ought not to be relaxed for men to sin and [thus] to lay down the law for themselves. Farinac. qu. 121, n. 118; Dominus Raynal. in his Observ. Crim. cap. 2, § 4, n. 156 and cap. 7, in Rubr. n. 117.

[1] quibus praehabitis: perhaps, these things being borne in mind, i.e., the facts showing Pompilia's guilt. [2] excusabilem. [3] ex quo; Mr. Hodell translates "for" and "hence," as though Archangeli were stating his own reasons, instead of the argument of his opponents, which he does in order to refute it. Ex quo is often used (sometimes elliptically) in the O. Y. B. [4] praedicta Jura; refers to the passages from the Digest in § Magnum quidem, x, 12, ante sec. 1.

AUTHORITIES

The passages from Farinacius and Raynaldus are among those cited by Gambi, § Alii vero, LXIII, 67, post sec. 73, and by Bottini, § In Jure quoque, CXCVIII, 201, post sec. 85. As they were greatly relied on by the Fisc, I abstract them quite fully.

Raynaldus Observ. Crim., ch. 2, § 4, n. 155 and 166, says: "In the third place, it should be noted in the case of husbands who do not observe the rule prescribed by the law in killing the adulteress, the ordinary penalty is remitted only in the case that they kill without premeditation, and without any interval of time and deliberation, according to the texts l. quod ait, and l. Gracchus of the lex Julia, etc. But even if they kill after an interval, they can from the kindness of the Prince hope for and obtain remission at least as to the ordinary penalty, because an injury of this kind is always present in the case of the nobly born, as Farinacius considers, cons. 141, n. 32, where after he shows throughout the whole consilium that a husband who kills after an interval is bound by the ordinary penalty of the lex Cornelia, finally in said n. 32 concedes that the Prince can be very easily moved to indulgence, although Giurba, cons. 80, and Gizzarellus, dec. 18, contend that the mitigation of the penalty should be obtained as a matter of right, for the said reason that honor is always weighing upon the heart, of which I speak more fully in cap. 7, in rubr. in n. 60 [117]." Raynaldus in this last cited passage says: "Some authorities limit this (the infliction of death) when he who commits the homicide is led thereto by serious injury, although he does it by design and after an interval of time and according to the common expression 'in cold blood' (a sangue freddo) * * (citing authorities), which allege two

reasons, the first of which is that natural reason urges that the injury should in some way be estimated together with the penalty; the second that a just cause produces just resentment, which is continually weighing upon the heart, and so should be rightfully taken into consideration all the time, and this opinion is held as the truer by Giurba, cons. 86, n. 19, and Caesar Panimolla, dec. 86, n. 32. But Farinacius, qu. 121, n. 118, and qu. 125, n. 403, and more fully in cons. 141, shows that the contrary opinion is more accurate, by the authority of the classic writers, and for many reasons, and he adds that otherwise many absurdities would follow: First, that all premeditated homicides would be punished with the extraordinary penalty, since there is scarcely any homicide that has not some cause of preceding injury; Secondly, that the reins would be relaxed to men for committing crime; Thirdly, that all men would be given a handle for declaring the law for themselves by their own authority which is altogether rejected by the law. And since the opinion of Farinacius is consonant with the law * * and still more advantageous to the Commonwealth, I am of opinion that a Judge should not depart from it in pronouncing judgment, although the Prince can depart from it by way of equity in some case of an injury extremely serious and of much importance."

Section 11.

[Arch., Pam. 1, xii, 13, § Nam praeterquamquod.]

For — besides that[1] Farinacius does not assert this conclusion positively, but shows that he is very much in doubt [saying]: "The matter is in my opinion extremely doubtful, because for the mitigation of the penalty, the causa honoris and just resentment which weigh forever upon the heart, influence me greatly," which words in connection with our present proposition are carefully weighed by Matthaeu de re Crim. contro. 12 under n. 22; and moreover not only Farinacius but also Dom. Raynaldus conclude that the penalty can be moderated by the judgment of the Prince[2] —

[1] Nam praeterquamquod. This section is parenthetical. Archangeli in the preceding section states the argument on the other side, and then goes on to refute it, calling attention in this section to the guarded language of Farinacius, and in the following section resumes his main argument as to the construction of the principal Texts. Mr. Hodell translates Nam praeterquamquod

simply as "furthermore," which alters the logical construction.
[2] Principe; as usual Princeps or Prince for the Sovereign power of the State.

AUTHORITIES

Farinacius, qu. 121, n. 118: "What should be said? The matter is in my opinion extremely doubtful; because for the mitigation of the penalty, the causa honoris and the just resentment, which weigh forever on the heart, influence me greatly (citing Grammaticus and others), but for not mitigating the penalty, besides the reasons aforesaid, it greatly influences me that the reins should not be relaxed for committing crime, and for men to declare the law for themselves by their own authority; therefore in a matter so doubtful follow the text in l. non puto ff. de Jure Fisci, but having consulted the Prince and not otherwise." This citation is from the Dig. 49, 14, 10: "Non puto delinquere eum qui in dubiis quaestionibus contra fiscum facile responderit." See § Ulterius, XXX, 30, post sec. 21. Matthaeu et Sanz, cont. 12, is the case of Franciscus Palomeque (See Appendix 3), where in n. 22 he refers to the doubt expressed by Farinacius.

Prosper Farinacius, reputed to be the greatest lawyer of his day, was born in Rome in 1544, was Advocate and Procurator of the Fisc under Clement VIII and Paul V, and died about 1616. His voluminous works comprise fifteen folios and cover the entire field of the law. No writer of his day was more frequently cited or regarded as higher authority. The O. Y. B. cites his works over a hundred times. His style, however, is obscure and prolix, and his propositions of law are stated with so many exceptions and qualifications, that it is difficult as Matthaeu et Sanz observes in cont. 28, n. 44 and 71, to determine whether they are affirmed or denied. His private morals were distinctly below par. He himself remarks rather pathetically in qu. 136, n. 1, "delicta carnis omnes tangunt (et mihi crede) etiam Jurisprudentes, et eos quidem excellentes." He is said to have been convicted of a very serious crime, but escaped punishment by the grace of Pope Clement VIII. The Holy Father observed to his friend, Cardinal Salviatus, "That flour of yours (Farina) is good, or rather it is very fine, but the sack that holds it is disgracefully dirty." The argument of Farinacius in behalf of Beatrice Cenci is translated in Appendix No. 1

SECTION 12.

[SPRETI, PAM. 2, XXVI, 28, § NEC VERUM EST.]

Nor is it true, as some authorities affirm, that it is necessary for the husband to detect his wife in the act of adultery and to kill her immediately (which is the case, they say, to which the aforesaid

laws apply), but that it is otherwise if [he kills her] after an interval, as is held by the authorities cited by Farinacius, who seems to follow them in qu. 121, from n. 111 to 118, and cons. 141 throughout, vol. 2. For the contrary opinion is more accurate, more generally held and to be observed in practice, as Marsilius well advises in cons. 105, n. 31 et seq., where he argues in defense of a certain nobleman, who killed another man after an interval. The latter had espoused the nobleman's sister per verba de futuro, and had kept her for three months, and then cast her off, by which great wrong and ignominy were inflicted upon the family of her brother and all his kindred, and Marsilius cites the aforesaid laws speaking of the husband who kills his adulterous wife. [See] Bertazzolius, cons. 42, n. 8 et seq. to the end, where he puts the case[1] of a man who had killed his adulterous wife and afterwards for his defense proved the adultery by the repeated[2] confession of the said wife; and Bertazzolius's son Claudius[3] in his note to the case states that the slayer was banished[4] by the Praetor of Mirandula for a time and after the expiration of several months was recalled[5] by the Duke of Mirandula.[6] Io. Franc. de Ponte cons. 98, n. 27 et seq. Vol. 1, repeated in decision of Sanfel. 337, under n. 87 et seq.

[1] ponit casum; Browning's favorite expression "put case." [2] geminata; often used of a confession made during torture, and repeated or ratified afterwards. See Glossary and Chartarius, B. 4, ch. 1. [3] Claudius filius. Not as Mr. Hodell translates, Claudius Jr. The consilia of Bertazzolius were edited and annotated by his son Claudius. [4] bannitum. [5] revocatum. [6] Mirandula; Mirandola in Modena.

AUTHORITIES

Marsilius, cons. 105, is not fully stated, for in that case the brother had first employed a mandatary to kill his sister's seducer and afterwards

had countermanded it before the deed was done. Hence Marsilius argued the defendant should not be punished with death; n. 31 supports the text. Farinacius and Bertazzolius are cited previously.

Io. Franc. de Ponte, cons. 98, n. 27, says: "The authorities hold that where the husband has had no opportunity after the adultery for some days or months, he is said to have acted forthwith, provided that he acted as soon as he could." While de Ponte is not cited in Sanfelicius, dec. 337, n. 87, as the text would apparently indicate, his consilium is there copied. These citations are used again by Spreti in § Suppetit quoque, XXIX, 30, post sec. 39; § Praedictis nullatenus, XXXIII, 32 post sec. 63, and § A qua quidem, CXXXI, 138, post sec. 53.

Section 13.

[Spreti, Pam. 2, xxvii, 28, § Nec verum est, vers. Afflict. super.]

[See also] de Afflictis, super Const. Reg. lib. 3, Rubric. 46, under n. 1, where (having quoted the Constitution of the Kingdom [of Naples] "si maritus," which grants immunity from punishment to a husband who kills his wife and the adulterer, provided that he kills them both in the very act of adultery and without any delay) he says that if both these requisites[1] do not concur, the husband is excused in part but not altogether,[2] and so is punished more mildly. And in n. 2, he gives the reason, because whenever anyone commits a crime under the influence of just resentment, the punishment ought to be somewhat moderated, according to the foregoing Text in l. si quis in gravi, § si quis moriens, vers. Maritus ff. ad Sen. Cons. Syllanian. [Dig. 29, 5, 3, 2] and other authorities which he cites in the same place. He is followed by Carer. Pract. Crim., § 9, excusatur maritus, n. 10, fol. 170; Caball. in said Res. 300, n. 24 and in the two sections following, where, and also in n. 46 [26] he testifies that he has seen this rule followed in an actual case;[3] Cabrer. de. metu lib. 2, cap. 45,

n. 13, vers. Quae quidem sententia; Bellon. de potest. eor. quae fiunt incontinenti [Lib. 2], cap. 20, n. 6, where it is said that it was so determined by the Senate of Milan.

[1] hujusmodi requisita: such requisites. [2] a tanto, non autem a toto. [3] in facti contingentia.

AUTHORITIES

de Afflictis super Const. Book 3, Rub. 46, is correctly quoted. The arrangement of Carerius is so confused that it is difficult to identify citations. This is from § Circa, Rubric. Ex quibus causis excusatur, n. 237; Nono excusatur maritus. See § Neque delictum, XVI, 17, post sec. 64. Spreti here makes the same reference to Caballus as does Archangeli, ante § Quoties enim, XII, 14, post sec. 30. Bellonus de Potestate, Book 2, ch. 20, is a commentary on the text Divus Hadrianus, which he says was applied by the Senate in the case of a husband killing his adulterous wife after an interval.

SECTION 14.

[SPRETI, PAM. 9, CXXXI, 138, § SUBSISTENTE ITAQUE.]

As therefore the defense of causa honoris holds good,[1] it is absolutely no objection that the homicides have been committed after an interval, according to what has been most fully proved in our past argument, § Nec verum est [XXVI, 28, sec. 12] as far as § Praedictis nullatenus [XXXII, 32, sec. 63] where it was shown that this is the most common opinion of the authorities, and that in accordance therewith decisions have everywhere been rendered, not only in the Sacred Consulta,[2] but also in all other tribunals of the world, as is well observed by Matthaeu, cited in our said past argument, de re Crimin. contro. 12, n. 7 and 11 [21].

[1] subsistente causa honoris. [2] in Sacra Consulta, i.e., in the Sacred Rota Romana; Mr. Hodell translates: "in the Sacred Courts." The Rota appears to be called the Sacra Consulta when called by the Pope to advise him on a question of law. See Farinacius, cons. 121, n. 1, and decis. 61, in Vol. 2 consilia.

Section 15.

[Spreti, Pam. 16, ccxxviii, 230, § Et quidem quamvis.]

And this is true[1] although he took this kind of vengeance[2] after an interval, as was very plainly demonstrated in my previous argument, § Nec verum est,[3] so that there are but few authorities who hold the contrary, and therefore it is almost heretical to doubt the truth of this opinion, as Soccinus Senior says, cons. 74, n. 8, book 1, especially since it has been received in almost all the tribunals of the world, notably in that of the Sacred Consulta,[4] which establishes the precedent for the other tribunals[5] of the City and of the entire Ecclesiastical State; so that Conciolus affirms that to depart from its opinion is also equivalent to sacrilege, Conciol. Alleg. 95, n. 33, and Alleg. 97, n. 8.

[1] Referring to the preceding section, § Quod vero, ccxxviii, 230, Ch. VII, sec. 10. [2] hujusmodi vindictam: vengeance by his own act, not by law. [3] xxvi, 28, ante sec. 12; not § Nec verum est, cxxvi, 134, Ch. VII, sec. 4. [4] The Sacred Rota Romana as Consulta. Mr. Hodell translates: "The Sacred Council." Cf. § Sicuti, xxi, 31, post sec 23. [5] quae normam praebet caeteris.

Authorities

Socinus Senior, cons. 74. This is a consilium of Bartolomaeus Socinus, in which he quotes numerous authorities (including his father, Marianus) on a question of prescription and says that since so many illustrious men of great reputation have affirmed this position, it would be heretical to depart from their opinion. Conciolus, Alleg. 97, n. 8; 95, n. 33: "which course of decision of the Roman Curia and especially of the Sacra Consulta in which so many men preside conspicuous for their learning, wisdom, and integrity should be considered as the law, so that to go against it is like sacrilege."

Section 16.

[Arch., Pam. xiv, 15, § Quocirca ubi.]

Therefore, when it is claimed that the husband should escape entirely[1] without punishment, then

it is requisite that the wife be killed when discovered in the very act of her disgrace; but where the question is, whether a husband who is driven to kill his wife causa honoris may be punished more mildly, it does not matter whether he kills his wife immediately or after an interval; Matthaeu de re Crim. contro. 12, n. 16.

[1] totaliter.

AUTHORITIES

In this section Archangeli states concisely the principal point of the case, and cites one of his strongest authorities, the case of Franciscus Palomeque. Guido's counsel never claimed that he should escape punishment, their efforts were merely to avoid the death penalty.

SECTION 17.

[ARCH., PAM. XIV, 16, § NEC TALIS SENTENTIA.]

Nor does this opinion lack a basis for support in the Civil law of the Romans itself, for Martianus in l. Divus Adrianus ff. ad l. Pomp. de Paricid. [Dig. 48, 9, 5] declares that a father, who had killed his son while hunting because[1] [the latter] had defiled his stepmother in adultery, had been banished,[2] although the father had not discovered the son in the very act of crime, but [killed him] in hunting, that is, after acts of friendship had intervened, and the injury was dissembled. Accordingly he was punished — but not with the usual penalty, — because he had killed his son not by the right of a father, but rather in the manner of a bandit.[3] Hence we can infer that it was not the killing, but the method of the killing that was punishable,[4] just as we may deduce from Bartolus on this passage, and Cuiac. in ff. tit. 40, n. 5, in Addit. litt. E.; and very excellently Decian. tractat. crimin. lib. 9, cap. 8, n. 11; Bertazzol.

cons. 356, n. 18; Farinac. cons. 66, n. 5; Dondeu. cons. 97, n. 5.

[1] ex quo. [2] deported to an island, instead of being put to death. [3] in the words of l. Divus Hadrianus, "quod latronis magis quam patris interfecit." [4] punibilem.

AUTHORITIES

Decianus tract. crim. book 9, ch. 8, n. 11, cites and explains, as in the text, l. Divus Adrianus. Bertazzolius, cons. 356, n. 18, cites the same without discussion. Farinacius in cons. 66, n. 5 (his argument in the case of Beatrice Cenci, see Appendix 1) elaborates the point. Dondeus, cons. 97, commenting on l. Divus Adrianus is cited post in § Adverti humiliter, XII, 13, sec. 29, and § Nec verum est, vers. Novar. XXVIII, 29, sec. 31, and § Quamquam ad hoc, XXVI, 27, sec. 32.

Hearn in The Aryan Household, p. 100, speaking of this case in connection with the authority of the "House Father," says, "the son may have been guilty, and the punishment may have been not excessive, but the deliberate severity of justice is a different thing from assassination."

SECTION 18.

[ARCH., PAM. 1, XV, 17, § PROINDE HIS.]

Relying on these and other reasons, and according to the more common opinion[1] of those who approve them, the authorities therefore affirm that a husband who kills his adulterous wife after an interval and not [when she was] discovered in the very act, is indeed punished, but more mildly and not in the usual way. Bart. in l. Divus ff. ad l. Pomp. de Parricid.; Bald. cons. 312, n. 5, lib. 4; Alex. cons. 140, n. 9, lib. 2; Afflict. in Constit. Regni Si maritus, n. 1, Rubr. 46, lib. 3; Tusch. pract. conclus. litt. A, conclus. 143, n. 31; Ruin. cons. 2, n. 7, lib. 3 [5]; Honded. cons. 104, n. 30, vol. 1; Bertazzol. cons. crim. 42 throughout; Jo. Franc. de Pont. 98, n. 8 et seq., lib. 1; Marta vot. Pis. 206 throughout; Giurba cons. 86, n. 19 and 21; Viv. decis. 241, n. 26 and 27; Grammat. dec. 13, n. 6; Gizzarell. decis. 18, n. 4 and 5; Sanfelic. dec.

264, n. 5 and dec. 337 throughout; Matthaeu de re Crim. cont. 12, n. 21; Thor. Compend. decis. verb. Occidens uxorem, before the middle, vers. Alias si ex intervallo, part 3, sec. 2.

[1] communiori calculo, the more general vote, or majority.

AUTHORITIES

Archangeli in the hurry of his first argument, in the preliminary stage of the case, gives this general résumé of the authorities, most of which are elsewhere cited upon special questions arising in the case. Some of them are not in point here, e.g., Alexander, book 2, cons. 143, n. 9, is merely a general proposition not relative to ex intervallo. Vivius, dec. 241, n. 26, relates only to proof of adultery. Tuschus Litt. A, conc. 143, n. 31, is an erroneous reference. de Afflictis, Book 3, Rub. 46, and Gizzarellus, dec. 18, previously cited. J. B. de Thoro Compend. Dec., Part 3, § 2, collects the authorities fully.

SECTION 19.

[ARCH., PAM. 1, XVI, 17, § ET IDEM PRACTICATUM.]

And that this has been the practice[1] in divers tribunals of the world is testified by Caball. in said cas. 300, n. 45, and other cases similarly decided are reviewed by Calvin. de Aequitate lib. 1, cap. 58, n. 18, 30 and 31; Cyriacus, who speaks in reference to a more serious case,[2] contro. 105, at the end; Matthaeu also reports more decided cases, contro. 12 at the end; and the authorities just now cited quote very many others.

[1] practicatum fuisse. [2] in gravioribus.

AUTHORITIES

The case reported by Cyriacus, cont. 105, was decided by the Senate of Milan, which relieved from the death penalty a son who had caused the death of his father, who, it appeared, had excited his son's "just resentment" by savage whipping and depriving him of food, although the son did not himself kill the father, nor during the act of castigation. Cyriac. cont. 105 is cited, § Similiter uxor, XXII, 22, Ch. IX, sec. 14. Matthaeu et Sanz, cont. 12, the oft cited case of Franciscus Palomeque. Caballus, cas. 300, n. 15, is an important case, cited frequently. Calvinus de Aequitate, lib. 1, ch. 58; the reference should be n. 13; follows Caballus.

Section 20.

[Spreti, Pam. 2, xxx, 30, § Cum igitur habeamus.]

Since, then, we have so many classical authorities who assert for the most vigorous[1] reasons that a homicide committed even after an interval upon the person[2] of a wife and of any other person[2] whomsoever, ex causa honoris, should not be punished with the ordinary penalty but with a milder one, and since furthermore the said Doctors declare that this has been so adjudged in the tribunals in which they have practiced, no attention should surely be paid to the contrary opinion of Farinacius, qu. 121 and cons. 141, because we clearly perceive[3] that he is speaking contrary to the opinion generally held, and more frequently received in the Courts. Valenz. Vel. cons. 139, n. 25 and 26; Rota recent. decis. 464, n. 8, part 5, tom. 2.

[1] vivissimis. [2] An awkward sentence. Persona used in two senses; as in English. So in § Sicuti enim, xxxi, 31, post sec. 23. [3] dignoscimus; distinguish.

Authorities

Rota Recent. Decis., Part 5, dec. 464: the Doctors who speak contrary to the common or received opinion are not to be cited as authorities. Valenzuela Velasquez, cons. 139, n. 25: an opinion which is common and received by many authorities is to be presumed and taken as true.

Section 21.

[Spreti, Pam. 2, xxx, 30, § Ulterius animadvertendo.]

Still further it should be observed[1] that the same[2] author in cons. 66, n. 5,[3] holds the contrary, grounding himself especially on the authority of the Text in leg. Divus Adrianus ff. ad leg. Pomp. de

Parricid. [Dig. 48, 9, 5] where a father who killed his son (not when discovered in the criminal act with his stepmother, but while out hunting and in the woods, and thus after an interval) was not punished with death but with deportation; the authority of which text is likewise referred to in corroboration of this opinion of ours by very many of the above cited Doctors; and it should be considered[1] also that the same author in qu. 121 aforesaid was in doubt and hesitated,[4] as in n. 118, where he confesses that the reason above given for this opinion of ours has great weight, namely, that the causa honoris and just resentment are always weighing upon the heart, and therefore he says that when the case occurs[5] the authority of the Text in leg. non puto ff. de Jure Fisci [Dig. 49, 14, 10] should be followed, where Modestinus the Jurisconsult[6] says that he does not think that he errs who, in doubtful questions, should without hesitation give an opinion contrary to the Fisc. This statement of Farinacius is referred to and followed by D. Raynald. part 2, cap. 2, § 4, n. 156, in a case like the present.[7]

[1] animadvertendo * * considerando etiam; for this use of the ablative phrase, see Glossary. [2] idem; generally equivalent to "said." [3] The argument of Farinacius in defense of Beatrice Cenci. [4] dubius haesit. [5] in contingentia facti. [6] Modestinus Jurisconsult; Mr. Hodell translates, Modestinus, Doctor of Law. Modestinus was one of the Jurists from whose writings the Digest was compiled; and this text was taken from his work de praescriptionibus. See Appendix 3. The meaning is that in doubtful cases there is a presumption of innocence and the defendant should be acquitted. See § Nam praeterquamquod, XII, 13, ante sec. 11. [7] in his terminis.

AUTHORITIES

Farinacius, qu. 121, n. 118; the language is "ideo in re sic dubia serva text in l. non puto ff. de Jur. Fisci *sed Principe consulto et non alias;*" i.e., such a case appeals to executive clemency solely.

Section 22.

[Spreti, Pam. 2, xxx, 31 § Cavendum autem.]

We should moreover be on our guard against what is claimed by the said[1] Farinacius, namely, that his opinion so far as he could gather was the one rather approved by the Sacred Consulta,[2] since, as he himself confesses, the doubt had not been then suggested, and hè could not prophesy what would have been the result if it had been suggested; and in truth the very judicious Fathers of the said Supreme Council[3] do not concur with his opinion, but hold the contrary which is favorable to us, as appears from the decisions[4] which are rendered every day. For it was so held on March 25, 1672, in the case of Carolus Falernus, who was sentenced with a mitigated[5] penalty for a homicide committed upon the person of Franciscus Dominicus, whom he met coming out of a church to which Falernus had forewarned him not to go, [Falernus] having suspected [Dominicus] of following his wife. A similar decision was rendered in the case of Carolus Matarazzus,[6] upon August 15, 1673, who killed his wife by reason of that silly suspicion[7] that her child should be suspected of illegitimacy,[8] a calculation having been made of the absence of her menses; although that suspicion did not agree with the truth as a matter of fact,[9] and the thing as a matter of law is absolutely fallacious and impenetrable by the human intellect,[10] according to the text in l. 1, § 14, ff. de agnosc. et alend. lib. [Dig. 25, 3, 1, 4] and the commentators thereon, and it is very well reasoned by the Rota in a case from Avignon concerning dower, March 3, 1692, § Sed cum hodie before my Reverend Father in God Caprara.[11]

[1] idem. [2] Sacra Consulta, the Sacred Roman Rota. [3] sapientissimi P.P. dicti supremi consessus; Mr. Hodell translates: "the wisest of the said high authorities." Consessus, assembly; i.e., the Rota. P.P. for Patres, cf. R.P.D. Caprara below and R.P.D. Ratta in the next section. [4] ex resolutionibus. [5] in extraordinariam; Mr. Hodell translates, unusual. [6] simili modo cum Carolo Matarazzo. [7] ex ea rusticana suspicione. [8] de non legitimitate. [9] in facto. [10] et in jure sit res prorsus fallax et humano intellectui impervia; Mr. Hodell translates: "And in law a matter may be even more mistaken and less observed by human intellect." [11] Alexander Caprara, Auditor of the Rota, appointed March 7, 1687, died June 8, 1711. These cases of Falernus and Matarazzus do not seem to be reported. Dynus, dec. 23, n. 40, refers to them in almost the same words. The decisions of Caprara, however, were published in 1725; this Dec. 110 was a civil action for dower against the father of the young wife, and the defense was that her child was born only 169 days after marriage. Caprara examines the authorities as to the duration of pregnancy.

Section 23.

[Spreti, Pam. 2, xxxi, 31 § Sicuti etiam.]

So also in the case of homicide committed treacherously with an arquebus on the person[1] of Thomas Bovinus by Franciscus Mattuccius of Monte San Giovanni, a person[1] of the lowest class, his sole reason being[2] the attempted dishonor of his sister, the proof of which was established by two witnesses of what they had heard said by the murdered man himself. On September 4, 1692, the penalty of life sentence to the galleys, to which on the preceding July 12, the said Mattuccius had been sentenced upon the most cogent proofs,[3] was moderated by the Sacred Consulta, the Reverend Father in God Ratta, of happy memory, delivering the opinion.[4]

[1] personam; persona; see Glossary. Cf. § Cum igitur, xxx, 30, ante sec. 20. [2] ex causa simpliciter tentatae pudicitiae. [3] ex indiciis urgentissimis. [4] ponente bo. mem. R.P.D. Ratta. Franciscus Ratta of Bologna was appointed to the Rota May 2,

1597, and died November 5 of the same year. The date of this case, 1692, would therefore seem to be erroneous. I cannot find it reported.

Section 24.

[Spreti, Pam. 2, xxxi, 31, § Jure itaque.]

Rightly therefore and deservedly the said Farinacius is expressly[1] refuted and rejected by Matthaeu de re Crimin. in said resol. [contro.] 12, n. 12; and by Dexart. in said dec. 5, especially n. 16.

[1] ex professo.

Section 25.

[Spreti, Pam. 2, xxxi, 32, § Et haec nostra.]

And this opinion of ours should be[1] the more readily accepted for this reason, when we reflect[2] that a husband is more angered by the adultery of his wife than if his son be killed, as is fully shown by Jo. Lopez. in Rubr. de donat. inter Virum et Uxor., § 78, n. 3, with the following sections; Boss. de Coit. damn. et punibil. n. 46; Cabal. resol. crimin. cas. 15, n. 9, and said cas. 300, n. 10; Novar. in Summ. Bullar. in said part 1, commentar. 72, under n. 81; Muta in said dec. 61, n. 1; yes indeed, and even more than if his daughter were violated. Nevizan. Silv. Nuptial. lib. 1, verb. Non est nubendum. n. 30; Paschal. de vir. patr. potest. par 1, cap. 5, n. 34, vers. Et de hoc crimine; Novar. said comment. 72 under n. 81.

This is so true that if a husband does not complain of the adultery of his wife, he is presumed to be a pander, as Paschalis proceeds to show where he says in the passage last cited: "Since the adultery of the wife not only injures the husband but blackens and stains all his kindred,"[3] as is said by Roman. cons. 451, n. 10; Boss. tit. de Coit. damn. et punibil. n. 44; Novar. in said comment. 72, under n. 81.

That this has happened in the present case is perfectly clear,[4] for the Abate Paolo, Guido's brother, was not only forced to leave the City, in which he had lived for many years with the highest repute, but to go away from Italy, because he had undoubtedly incurred the greatest disgrace, through such adultery.[5] To such an extent was this true that when he was prosecuting Guido's case before the court[6] it was his own ill luck to excite the laughter and jeers of almost all present, even though they were sensible and judicious men — I shall not, however, say this of the judges themselves, as it has usually happened even in their case, as Castrensis testified, cons. 277 under n. 3, vers. Sed nec Judices, lib. 2; followed by Nevizan. Silv. Nuptial. lib. 1, verb. Non est nubendum, under n. 94; Caball. in said cas. 300, n. 17; Matth. contro. 12, n. 25; Boer. dec. 298, n. 1; Caldero dec. 42, n. 6.

[1] recipienda venit. [2] ponderando. [3] cognationem. [4] manibus palpatum est. [5] hujusmodi adulterium. [6] cum judicialiter prosequeretur.

AUTHORITIES

The citations support the text; and many of them have been used before. Boerius, dec. 298, is very strong. The judges practically declined to exercise their jurisdiction in prosecutions for adultery. This decision and that preceding it throw much light on the state of society in France in the early part of the 16th century. Bossius de Coitu damnato, n. 46, says, "adultery afflicts a man with greater grief than the death of a son." Cf. n. 44. Caballus, cas. 15, n. 9: "a greater injury is done to a husband by committing adultery with his wife than by killing his son." Nevizanus, Non est nubendum, n. 30: "For a husband is more angered by his wife's adultery than if his daughter be violated or his wife killed." Paschalis de Viribus, part 1, ch. 5, n. 34, to the same effect. Ludovicus de Ponte (Romanus), cons. 145, n. 10, uses the phrase quoted in the text: "quia adulterium totam cognitionem denigrat et maculat." Caldero dec. Cathaloniae 42, n. 6, quotes the authorities holding that since a man cannot prosecute in such a case without ridicule and disgrace, he has a right to vindicate himself.

The argument in the last part of this section is repeated in § Tanto magis, CXXXIII, 139, post sec. 61.

Section 26.

[Arch., Pam. 8, ci, 109, § Quod pro certo.]

And this should be a sufficient reason[1] that he and his companions should be dealt with more mildly, if it be borne in mind[2] that the causa honoris is more than sufficient[3] for mitigating the penalty, as we have proved in our other argument,[4] namely, that a husband may kill his adulterous wife even after an interval without incurring the extreme punishment, whenever[5] the adultery is proved, as my Lord the Advocate of the Fisc concedes in his reply, § Solamque suspicionem [cxcvii, 201 post sec. 81].

[1] quod pro certo sufficeret: which would be enough for certain. The relative quod refers to the proposition contained in the preceding section of Archangeli's argument in Pam. 8, § Confessio D. Guidonis, ci, 109, Ch. V, sec. 17, as to the effect of his confession. [2] attento; see Glossary. [3] sufficientissima; note the superlative. [4] Archangeli's first argument, Pamphlet 1. [5] quoties.

Section 27.

[Arch., Pam. 8, ci, 109, § Et in rei veritate.]

And in very truth we have cited in our other argument very many decisions of the highest tribunals[1] from which it appears that the penalty has been diminished[2] for husbands who have caused the deaths of their wives even by means of assassination,[3] and on the other hand[4] no decision is cited favorable to the Fisc. Such an opinion is therefore the more readily to be accepted, because it is sanctioned[5] by the majority of the authorities. And although Farinacius and my master Raynaldus[6] seem to follow the contrary opinion, nevertheless Farinacius in his Quaestiones has declared

himself to be extremely doubtful, as I have set forth in my other argument,[7] and in cons. 141 has shown himself extremely changeable, while in cons. 66, n. 5, he approved[8] the contrary. Therefore, when reminded of this inconsistency, he asserted by way of excusing himself in said cons. 141 in n. 16, that Beatrice,[9] in behalf of whom he had argued in cons. 66, had been beheaded,[10] as if a rigorous sentence like that were followed in practice;[11] but may this so distinguished authority pardon me, his answer is extremely inconsistent, as he had forgotten what he had allowed to remain written[12] at the end of said cons. 66, that is, that Beatrice had been punished with the extreme penalty, not because she had, after an interval, procured the death of him who was plotting against her honor, but because she had not proved her defense, — where he says: "As indeed it was confidently hoped would have been the case as to his sister Beatrice, if she had proved the defense which had been put forward for her, which she did not in fact prove."

[1] supremorum Senatuum. [2] minoratam. [3] mediante assassinio. [4] vice versa; sometimes found as versa vice. [5] canonizatur, see Glossary. [6] Canon Raynaldus is always alluded to with great respect. [7] in § Nam praeterquamquod, Pam. 1, XII, 13, ante sec. 11. [8] contrarium probavit. [9] Beatricem; in the margin of the O.Y.B. is written the full name Beatrice Cenci. For a full account of this case see Appendix 1, and Berdoe's Cyclopedia, p. 97. [10] capite obtruncatam. [11] in practica servetur. [12] scripta reliquerat.

AUTHORITIES

Farinacius, cons. 141, n. 16, a case of uxoricide ex intervallo, refers to the Cenci case and defends himself from the charge of inconsistency: "quod contrarium fuit servatum, quia non obstantibus a me allegatis miserrima illa mulier, pro qua consulebam, fuit capite obtruncata."

Section 28.

[Arch., Pam. 8, cii, 110, § Dominus vero Raynaldus.]

But my master Raynaldus, whose writings and words I revere, in his Observationes Criminales cap. 2, § 4, n. 156 (except that he asserts that some modification at least of the ordinary penalty may be hoped for from the mercy of the Sovereign),[1] does not decide the point[2] by citing Gizzarellus and Giurba who maintain that the penalty ought to be diminished as a matter of justice, but he returns to what he wrote in cap. 7 in Rubric under n. 60, where, however, he does not expressly examine the point of homicide committed ex causa honoris;[3] otherwise he would go counter to the general opinion of the authorities and of so many decisions of the supreme Judges, that is, to the common practice of the courts, as to which also Clarus bears witness, § Homicidium under n. 51, where he says: "And this opinion is followed in practice as I find in an actual case[4] the Court of Naples has decided." And Matthaeu likewise bears witness to the same practice, de re Crimin. Contro. 12, n. 29.

[1] Principis. [2] articulum. [3] ubi tamen ex professo non examinat articulum homicidii admissi ex causa honoris; Mr. Hodell translates: "where, however, he does not openly examine the point as to murder permitted for honor's sake." [4] in contingentia facti.

Authorities

Clarus, § Homicidium, n. 51, is speaking of a husband's right to delegate his vengeance. Matthaeu et Sanz, contro. 12, is the Palomeque case. A comparison of the passages cited from Raynaldus justifies Archangeli's criticism. Jo. Dominicus Raynaldus was a Canon of St. Peter's, Advocate of the Fisc in Romandiola, Locumtenens at Ravenna and at Rome, Judge in Spoleto, and Procurator Pauperum. His Observationes or Commentary on the Ordinances of Bologna (1689) form an admirable compend of the criminal law. He also wrote a Praxis, and his Vota were published posthumously in 1735. He is cited nearly thirty times in the O. Y. B. and referred to with great respect.

Section 29.

[Arch., Pam. 1, xii, 13, § Adverti humiliter.]

I respectfully beg that this be noted, that the aforesaid laws which seem to require discovery in the very act of crime,[1] as some are of opinion, do not lay this down in order [merely] to excuse a husband who is led to kill by sudden impulse of wrath and his unreasoning passion, but lest men should on every suspicion of adultery, very often baseless, rush upon their wives to kill them who are frequently innocent. Therefore, the "detection in the act of crime,"[2] required by these laws, does not relate to, nor is it to be understood of discovery in the very act of dishonor,[3] but it relates to the proof of the adultery, lest the wife upon slender suspicion should be committed to death. Where, however, the adultery is not doubtful,[4] no distinction exists so far as the escape from the maximum penalty is concerned, between killing immediately[5] and after an interval,[6] as is said on this point[7] by Dondeus, as may be seen by way of example[8] in cons. 97, n. 17.

[1] reperitionem in fraganti [flagranti]. [2] depraehensio in crimine; as in ll. Si tamen maritus; Lenocinii quidem; Marito quoque; Imperatores, etc.; q.v. in Appendix. [3] de reperitione in actu turpitudinis. [4] dubitabile. [5] incontinenti. [6] ex intervallo. [7] in puncto. [8] ex gra. videnda.

Authorities

Dondeus, cons. 97, n. 17, comments on the similar statute of Milan, following the Lex Longobardorum, where the word "invenerit" is used, and says that this is intended in reference to the proof, not the time, in order that the husband may not act on mere suspicion or conjecture. Dondeus refers to the Gloss on the word "deprehensam" similarly construed. Dondeus was an advocate of Tortona and Milan, and died in 1615. He is cited about a dozen times in the O. Y. B., and his consilium on the question: "Probato adulterio, an ulla poena infligi debeat marito occidenti uxorem ex intervallo?" contains a remarkably clear discussion of the whole subject.

Section 30.

[Arch., Pam. 1, xii, 14, § Quoties enim uxor.]

For whenever a wife is convicted of adultery, or when she is evidently guilty of adultery, she is always said to be "detected in the crime;"[1] Glos. in cap. Ex litterarum 4, de eo qui dux. in Matrim. qua poll. per Adult. on the word "deprehensam," where it is said: "That is, convicted, for the detection alone is not sufficient in order that she may be legally separated, although it is sufficient for infamy." Glos. in l. 1 on the word "depraehensus," C. ubi Senat. vel Clariss. [Cod. 3, 24, 1]; Bartol. in l. 1, n. 1, C. de Petit. Bon. Sublat. lib. 10 [Cod. 10, 12, 1]; Io. de Plat. in Rubric C. eod. n. 1; Caball. Resol. Crim. cas. 300, n. 26 [25]; Bertazzol. consil. crim. 42, n. 10; Matthaeu de re Crim. cont. 12, n. 5 [15]; especially[2] Sanfelix. dec. 337, n. 91, etc., and said lex Romuli[3] speaks of "a wife being convicted."[4]

[1] in crimine depraehensa. [2] optime. [3] See ante § Quod idem, x, 12, ante sec. 2. [4] This entire section is printed in italic; Archangeli evidently considers it important.

Authorities

The Gloss on cap. Ex litterarum (Decretal 4, Tit. 7. De eo qui duxit in matrimonium, cap. 4) as quoted by Archangeli is "Id est convictam, sola enim," etc.; but the words of the Gloss as I find them are "Id est coniunctam, sola enim deprehensio non sufficeret ad hoc ut separaretur * * * licet sufficiat ad infamiam." This is evidently here an error or a misprint, see the section following. Gloss on word "deprehensus" (Cod. 3, 24, 1), C. ubi Senatores vel Clarissimi, "Secus convictus sed non deprehensus, quod non placet." Cod. l. 1, n. 1, de Petit. bon. sublat. [10, 12, 1], is, "quisquis in crimine majestatis deprehensus," etc.; Bartolus says, "He is said to be 'detected' in the crime (deprehensus in crimine) qui de eo est convictus."

Caballus, cas. 300, n. 25: "she is said to be detected in adultery who is convicted of it either by her own confession or otherwise, although she is not found in flagranti crimine" * * "I have seen this observed where the case occurred, and a husband excused from the death penalty who had killed his adulterous wife, although she was not discovered in

the act, but was really and truly such, and this having been very clearly proved, and to this opinion I myself have also come, as being the more lenient and milder view."

Bertazzolius, cons. 42, n. 10, is more fully cited by Spreti, § Nec verum est, XXVI, 28, Matthaeu et Sanz, cont. 12, is the case of Palomeque, see Appendix 3. In n. 15 he cites Bartolus, Bertazzolius, and Caballus, and says, "And so whenever the husband perceives evidently the adultery of his wife he should be said to detect her (eam deprehendere dicendum est)." Sanfelicius, dec. 337, n. 91: "And since that which is notorious endures continually, there is no interval of time between the killing and the adultery; and therefore it is not necessary to consider the word 'deprehenderit,' which does not import only the actual deprehensio; but also whenever anyone is convicted of crime he may be said to be deprehensus in the crime * * * and especially in adultery."

SECTION 31.

[SPRETI, PAM. 2, XXVIII, 29, § NEC VERUM EST, VERS. NOVAR. IN SUMM.]

See also, Novar. in Summ. Bullar. par. 1, Comment. 72, sub n. 81, vers. Ex quo adulterio; Baldaxari de Angelis in addit. ad Gizzarell. decis. 18, n. 5; Carol. Anton. de Luc. in addit. ad De Franch. dec. 678, n. 8 at the end, vers. Maritus vel pater; and Donde. in said cons. 97, from n. 10, as far as the end where, in vers. Et haec mea interpretatio, he says that this interpretation is manifestly proved by the Gloss on cap. Ex litterarum 4, de eo qui dux. in matrim. quam polluit per adulterium [Decretal 4, Tit. 7, cap. 4]. For when in the text these words are used, "your wife detected [depraehensam] in adultery," the Gloss on the word "depraehensam" explains it as convicted [convictam]. Marta vot. seu decis. 206 throughout, says in n. 4, that this opinion is very just, fair, and generally held; Muta dec. Siciliae 61, n. 11 and 12; and at the end[1] Muta puts the decision of the Magna Curia of the Kingdom by which a husband was condemned to the galleys for seven years, and this

because the circumstances of the case were taken into consideration, viz.: that he had caused his wife to be summoned by his son outside of the city walls, and there had killed her, and afterwards her corpse had been found to be devoured by dogs.

[1] in calce.

AUTHORITIES

Novarius Summa Bullarum, part 1, Comment. 72, n. 81, is very positive. He says no one doubts that a husband should be excused from the ordinary penalty if he kills her as soon as he is able, though after an interval of time. Card. de Luca, add. to De Franchis, vol. 4, dec. 678, n. 8, also lays this down flatly. B. de Angelis in note to Gizzarellus, dec. 18, is to the same effect. Marta vot. 206 says that a husband who kills his wife's adulterer ex intervallo should be more mildly punished according to the common opinion of the doctors except Gomezius ad leg. 80 Tauri, whose views are not founded on reason. Muta dec. Siciliae 61, is the case of Leonardus, frequently cited. The words in this decision, per filium, may mean her son or his son. Muta was one of the Judges of the Supreme Court of Sicily.

See this case cited in § Agnoscit fiscus, CXXXIV, 140, Ch. X, sec. 1, and § Et tantum, CXXXII, 139, post sec. 55.

SECTION 32.

[SPRETI, PAM. 2, XXVI, 27, § QUAMQUAM AD HOC.]

Although moreover[1] we should not indeed hold it necessary in order that there may be occasion for mitigating the aforesaid penalty, that the adultery of the wife should have been conclusively proved, as in fact it is. For it would be enough if we were dealing with a mere suspicion, Gloss in l. Divus Adrianus [Dig. 48, 9, 1, 3], where it is said in the statement of the case,[2] "A man who killed his son whom he believed to have lain with his stepmother (which perhaps was true) is banished to an island;"[3] ff. ad leg. Pompeiam de Parricid [Dig. 48, 9, 5]; Innoc. in cap. Si vero (si vere), sub. n. 1,

vers. Nec laicus dubitaret, and vers. Vel ipse laicus de hoc probabiliter dubitaret, De sent[entia] excomm[unicationis]; Aretin. [Angelus de Gambilionibus] cons. 85, n. 55; Grammat. cons. 18, n. 5, and cons. 29, n. 2; Farinac. cons. 35, n. 22; also Grammat. dec. 5, n. 10, where he speaks of a man who had boasted of his intention to violate the sister of the man who therefore killed him; which threat is said to have excited in the latter just suspicion, and fear of loss of honor [sufficient to enable him] to escape the ordinary penalty of homicide; Donde. cons. 97, n. 5, speaks very excellently on this point.

[1] Quamquam adhoc. Perhaps adhuc. [2] in figuratione casus. The technical term for the formal statement of the case, with which the Gloss frequently begins, see Glossary. The reference is to the important l. Divus Adrianus, and the Gloss as quoted is "et erat forte verum." Perhaps we should translate "which happened to be true." [3] deportatur in insulam.

AUTHORITIES

Innoc. in cap. Si vere; the Commentary of Pope Innocent IV on Decretals 5, Tit. 39, de sententia excommunicationis, cap. 34, si vere. Dondeus, cons. 97, n. 5; compare also Farinacius, qu. 121, n. 63, and Sanfelicius, dec. 337, n. 54, and § Adverti humiliter, XII, 13, ante sec. 29.

Farinacius, cons. 35, n. 22, cites the canon law, Aretinus, and Grammaticus as referred to. Speaking of homicide he says: "Nay more, not only should one be excused of homicide when he kills a man who comes rushing on him with arms, but also when he may have probable doubt about the attack." Grammaticus, dec. 5, n. 10, says that the fear of the loss of honor is just apprehension. Grammaticus, cons. 18; a case of homicide committed in a quarrel. The younger man drew his sword; the elder struck him with a cane, and having thrown him to the ground, beat his head against the ground so that he died. The Magna Curia sentenced the homicide to perpetual exile in the galleys, but Grammaticus on appeal to the Royal Council argued that the sentence should not be for more than five years. Cons. 29 is a similar case. Dondeus, cons. 97 has been cited before, § Adverti humiliter, XII, 13, ante sec. 29.

Thomas Grammaticus was a member of the Royal Council of Naples, and his Decisiones and Consilia were authoritative. They are cited about fifteen times in the O. Y. B.

Section 33.

[Spreti, Pam. 2, xxviii, 29, § Nec verum est, vers. Dexar. decis.]

See also Dexartus dec. Sardiniae 5, throughout, where at the end he affirms that it was so decided by the Sacred Pretorian Court in condemning a husband merely to exile; and Sanfelicius dec. 337, n. 12 and 13, where he says that certain young noblemen, who had killed their wives after an interval, and upon a violent suspicion of adultery[1] were acquitted by the Royal Council of Naples, the qualifying fact of the rank[2] of the defendants also being in the case. Doctors of law of the highest standing[3] prepared briefs[4] in their behalf, whose arguments the said author annexes to the said decision. And although some of the defendants were sentenced to the galleys,[5] he says that this punishment was, as a matter of fact,[6] imposed by reason of the mutilation of the private parts of the victims which occurred, because in truth those who do this are considered as enemies to nature. Panimoll. dec. 86 in n. 20, and many sections following, discusses this matter very fully; see Caldero dec. 42, n. 16 and 17, where although in the preceding sections he inclined to an opinion contrary to ours, when he saw the view of Matthaeu above cited by us, came over to the latter's opinion.

[1] To emphasize the fact that the homicide was on suspicion merely. The two cases were parallel in three particulars. 1. The homicides were ex intervallo. 2. They were committed on suspicion and not in flagranti. 3. The defendants were noblemen. [2] concurrente qualitate personae; see Glossary. [3] doctores primae classis; "first class lawyers." [4] ad quorum favorem scripserunt. [5] ad remigandum; Sanfelicius, however, says ad relegandum. [6] de facto. Possibly this may qualify the latter part of the sentence; Sanfelicius, dec. 337, n. 13, says: "et quamvis aliqui fuerunt damnati ad relegandum, fuit ex causa incisionis genitalium de

facto, pro quo delicto dicebat Fiscus esse puniendos." Cf. § Agnoscit Fiscus, CXXXIV, 140, Ch. X, sec. 1.

AUTHORITIES

Sanfelicius, dec. 337, is frequently cited in the O. Y. B. In n. 12, cited here, he says: "However, in the case under consideration it was established as true that even if the requisites of the said Const. si maritus did not exist, and even if the homicide occurred after an interval of time, provided that it was committed by reason of a detected adultery, the husband, if not altogether excused, is punished more mildly. * * Moreover as the rank of the parties was also a fact in the case, together with a just cause of adultery, certain young noblemen, one of whom was distinguished by a title, were discharged, they having killed their wives after an interval, and by reason of a violent suspicion of adultery. Men of the highest standing argued in their behalf, whose arguments I will annex hereto. And although," etc., as quoted in the text.

Caesar de Panimolla, dec. 86, n. 20, was the case of one who killed the adulterous wife of his brother, honoris reparatione, though not in the act of adultery, but after an interval. Panimolla decided in a very good opinion that the defendant should not be punished with death, citing Farinacius's argument in the Beatrice Cenci case among others, and laying stress on the distinction between real and personal injuries as affecting the reparation of honor after an interval. This is a strong authority for Guido. As to real and personal injuries, see § Suppetit quoquo, XXIX, 30, post sec. 39. Caldero, dec. 42, n. 16 and 17 cites Matthaeu with evident respect but does not absolutely pronounce in favor of the milder opinion as alleged by Spreti.

SECTION 34.

[SPRETI, PAM. 16, CCXXVII, 229, § OMISSA ULTERIORI.]

I omit further dispute with my Lord the Advocate of the Fisc about the service of a copy of his argument,[1] because the time is short, and I have professed great respect for him from my boyhood.[2] Let us also pass over [his claim] that when the question concerns death inflicted by a husband upon his wife not in the act of detecting her in adultery, but after an interval, mere suspicion, however powerful, is not sufficient to exempt him from the ordinary penalty of the lex Cornelia de Sicariis, but that the clearest[3] proof of adultery is

required, according as it is alleged on the other side; the contrary of which, however, we have proved in our past argument, § Quamquam ad hoc,[4] and as these authorities, not there cited, maintain. Dond. consult. 97, n. 16 at the end; Sanfelic. dec. 337, n. 12; Muta dec. 61, n. 2; where it is said that it is sufficient that [a man and a woman] be found alone in a dwelling;[5] and in n. 3, that this is so especially if the woman was pretty; Mascard. de probat. conclus. 61, n. 1, and the two sections following, where he quotes that verse of Ovid:

> "Great is the strife of modesty and beauty,
> And the man kept eagerly craving her."[6]

So in the present case according to another verse of the same author:

> "From this young and passionate man can she be believed to have returned a virgin?"[7]

[1] Spreti in Pamphlet 9, § Voluissem, CXXXVIII, 143, Ch. XI, sec. 28, complained that Bottini, the Advocate of the Fisc, had failed to send him copies of the briefs submitted, much to his astonishment. Bottini in Pamphlet 13, § Redarguit, CLXIII, 171 (in this book placed in the argument concerning Torture, Ch. V, sec. 29), answered the charge with some heat in the familiar "tu quoque" style. Spreti here has the final word. [2] Spreti would thus appear to have been much younger than Bottini. What can be gleaned of the personality of these men and the other counsel is found in Ch. II. [3] liquidissima probatio. [4] XXVI, 27, ante sec. 32. [5] in mansione; or in a room? Mansio is used in this sense, § Sed profecto, CXI, 119, Ch. VI, sec. 22. Mr. Hodell translates: "some retreat." Cf. "In my father's house are many mansions," John XIV, 2. See Bassanus B. vi, ch. vi, n. 62, in solita carceratum mansione. [6] "lis est cum forma magna pudicitiae," Ovid, Heroides, XVI, 290. The verse following, Et vir illam desiderabat," appears to be added. [7] "a juvene et cupido credatur reddita virgo," Ovid, Heroides, V, 109; Lamparelli, Ch. XII, sec. 14.

AUTHORITIES

Dondeus, cons. 97, n. 16, says the adultery may be shown by the confession of the woman or by a violent presumption and undoubted indicia. Sanfelicius, dec. 337, n. 12, is satisfied with a "vehement

suspicion." Muta, dec. 61, the case of Leonardus, does not go so far as the text. He said the intention may be inferred from the facts stated. Mascardus, conclus. 61, n. 1, is on the question whether adultery is proved by the discovery of a man in the house of a beautiful woman.

Section 35.

[Arch., Pam. xii, 14, § Et in rei veritate.]

And in very truth, the reasons adduced by those following the contrary opinion are entirely too weak. For homicide committed ex causa honoris, whenever it is committed is always said to be committed immediately,[1] because the injury to honor remains always before the husband's eyes, and by pressing on him with its constant and increasing spurs, excites and drives him on to its reparation. Giurba cons. 86, n. 18 and 19; Balthas. [Baldaxar] de Angel. in Addit. ad Gizzarel. dec. 18, n. 5; Prat. Respons. Crim. 25, n. 5, at the end; Sanfelix. dec. 337, n. 50.

[1] incontinenti.

Authorities

Giurba, cons. 86, previously cited, § Magnum quidem, x, 12, ante sec. 1. In this case, a brother, causa honoris, killed the man who had dishonored his sister, after three years had elapsed. Giurba maintains that the law excusing homicide if committed incontinenti does not mean that it must be in the same moment of time, but that an interval is allowed, according to the case, to be estimated according to the discretion of the Judge, citing instances where three days, a month, six months or even ten years had intervened. In this case the brother was sentenced, in 1622, to the galleys for life. Baldaxar de Angelis in note to Gizzarellus, dec. 18, cites this case.

The reference to Sanfelicius, dec. 337, n. 50, is to the argument of one of the counsel in that case who says: "whenever the honor of anyone is injured, the offense has a continuous effect (tractum habet successivum), because honor is always being injured by the offense." See as to tractum successivum, note to § Quemadmodum, xxix, 30, post sec. 37.

Marius Giurba was a jurisconsult of Messina and lecturer on Feudal law in the Gymnasium. His consilia are carefully prepared arguments and opinions, published in 1626. This rather rare book is cited about twenty times in the O. Y. B., especially this consilium.

Section 36.

[Spreti, Pam. 2, xxix, 29, § Et ratio est.]

And the reason is very evident, because when an injury of this kind has been received by men of good birth, especially noblemen, it is ever present with them,[1] and continually oppresses the heart and urges them to take vengeance for the recovery of their lost honor, as is well observed by Giurba in said cons. 86, n. 19; Bellon. de potest. eorum qua fiunt incontin. in said cap. 20, n. 6; Carol. Ant. de Luca in addit. ad Franch. dec. 678, n. 8, at the end, vers. Maritus vel pater; Sanfelic. in said dec. 337, or better in the first argument added to said decision, n. 50; Panimoll. in said dec. 86, n. 21 et seq.

[1] eisdem.

Authorities

Spreti repeats the references to Giurba and Sanfelicius cited by Archangeli in the preceding section, § Et in rei veritate, xii, 14. The case from Panimolla is noted ante in § Nec verum est, vers. Dexart. xxviii, 29, sec. 33. The reference to Bellonus is found in § Nec verum est, vers. Afflict. xxvii, 28, sec. 13. Ant. de Luca ad Franch. dec. 678, n. 8, is cited in § Nec verum est, vers. Novar. in Summ. xxviii, 29, sec. 31.

Section 37.

[Spreti, Pam. 2, xxix, 30, § Quemadmodum semper.]

Just so[1] Grammaticus and Gizzarellus declare for the aforesaid reason that always and whenever the question concerns a homicide committed ex causa honoris, the ordinary death penalty has no place, but it should be mitigated at the discretion of the Judge, even although the homicide had been accomplished[2] after an interval, and after a long time, and they report that it has been so decided, Grammatic. dec. 5 and 23; and Gizzarell. decis. 18,

n. 4, where it is said that it has always been so adjudged by the Sacred Council of Naples, and that this opinion has always been accepted by our ancestors; and on this point in n. 5; Baldax. de Angel. n. 1 et seq.; Prat. respons. crim. 25, n. 15 at the end; Adden. ad Pascal. de virib. Patr. potest. par. 3, cap. 6, § Congruit, page 343; Vermigl. cons. 37, n. 11; Rot. Genuen. vot. 12, sub n. 5, vers. Et adeo privilegiata, post Censal. ad leg. un. Codic. si quis Imperat. maledix. [Codex 9, 7]; see Campan. resolut. 16, n. 5, where he says that it was thus decided by the High District Court,[3] although the case concerned a homicide committed after two years and treacherously by two brothers on the adulterer of their female cousin;[4] see Cyriac. contro. 104, n. 73 [contr. 105, n. 73], where he speaks of a homicide committed by a wife on the person of her husband for the reason that he was keeping a mistress, and plotting against her honor; and Cyriacus says that since just resentment has a protracted continuance, vengeance taken by reason of the final pang of resentment[5] should always be said to have followed immediately. Polic. de Reg. Audien. vol. 2, tit. 10, cap. 7, n. 30.

[1] quemadmodum. [2] sequutum fuerit; perhaps better, "the homicide had followed." [3] per magnam Curiam Vicariae; Mr. Hodell translates: "the high court of the Vicar." Vicarius, see DuCange, is used of a Deputy Judge. Vicaria signified either the jurisdiction of the Vicarius or the place in which the jurisdiction was exercised. Magna Curia Vicariae, abbreviated as M. C. V., was equivalent, as we might say, to the District or Circuit Court. [4] The text is de homicidio commisso a duobus fratribus in personam adulterae eorum sororis consobrinae." Mr. Hodell translates: "a murder committed by two brothers upon the adulteress in the presence of her sister's cousin." Adulterae is an evident misprint for adulteri, as appears from the text of Campana noted below. Consobrinus is strictly used of a cousin, child of a mother's sister, though loosely of any first cousin; frater consobrinus and soror consobrina are used to indicate the sex of the cousin as male or

female. See Glossary under consobrinus, and compare the text of Compana, noted below, and Grammaticus, dec. 5, n. 11, "cum omnes sint fratres consobrini defuncti." [5] An awkward sentence. "Quod justus dolor cum habeat tractum successivum ratione ultimi doloris ultio semper dici debet sequuta incontinenti." Not the word successivus or succisivus for subsecivus or subsicivus, left over, occasional or incidental, as in Charles Butler's Horae Juridicae Subsecivae. Mr. Hodell translates, "since just anger has a long continuance, because of its extreme bitterness, vengeance should always be said to follow immediately."

AUTHORITIES

Grammaticus, dec. 5, n. 23, notes the case of the Smyrnean woman (Grammaticus says Muriae) which Dolabella brought before the Areopagus. See § Et non semel, XXII, 22, Ch. IX, sec. 13. Gizzarellus, dec. 18, and Baldaxar de Angelis thereon, previously cited. Pratus, in his note to Paschalis de viribus, part 3, ch. 6, § Congruit quoque, says the Judge must use his discretion; and the offense, committed honoris causa and therefore incontinenti, should not be punished with death. Rot. Genuen. vot. 12 in Censalius, was a case of homicide committed in revenge for a gross insult received the night before, and therefore not punishable with death. Vermigliolus, cons. 37, n. 11, says that an injury to honor is always fresh in the minds of men of good birth, and may be resented after an interval of time.

Campana, Resol. 16, n. 5, makes the text clear. It is the case of two brothers of Noli in 1644, who treacherously killed another citizen of the town because of his illicit relations, continued for many years, with their cousin (sororem consobrinam), although with the connivance of her husband. Campana continues: "licet enim praedictis fratribus consobrinis actio querelandi non competeret * * * agebatur de injuria gravi quae uni de cognatione facta, omnibus cognatis communis est et totius cognationis honorem laedit." It will be observed that the cousins (consobrini) were referred to as cognati.

Cyriacus, cont. 105, n. 73; the point here was that the wife was subjected to uninterrupted daily ill treatment, and her just resentment culminating in vengeance was therefore considered to be immediate. Cyriacus says: "Sed in actu successivo prout * * quotidie et singulis horis dicitur durare justus dolor, et sic respectu ultimi doloris semper dicitur fieri incontinenti," etc. See § Et in rei, XII, 14, ante sec. 35. Archangeli in § Ultra quod, XV, 16, post sec. 47, quotes Sanfelicius, dec. 337, to the same effect.

SECTION 38.

[ARCH., PAM. 8, CXIII, 121, § EX HIS IGITUR.]

From these considerations therefore it appears that the adultery of Francesca has been most

fully proved;[1] and hence even according to the opinion of the Fisc, her homicide (although it was committed after an interval) is not to be atoned[2] by the penalty of death, not only because of the justly conceived resentment, but also because an injury to one's honor always retains its strength according to the verse of Virgil in the Aeneid, Book 1 [line 36], "Aeternum servans sub pectore vulnus" [nursing an undying wound deep in her heart].

[1] plenissime probatum; technically used of absolute proof.
[2] expiabile.

Section 39.

[Spreti, Pam. 2, xxix, 30, § Suppetit quoque.]

Another reason also presents itself which is considered by the authorities, namely, that an injury by which one's honor is wounded is not personal but real, which therefore can be resented at any time whatever, even after the lapse of the longest time as, in cases like ours,[1] is held by Giurba cons. 86, n. 20 and 21; Io. Francisc. de Ponte. in said cons. 98, n. 29 et seq., lib. 1, repeated by Sanfelic. under said dec. 337 in n. 87, vers. Nam cum fiat et seq.; Cabrer. de met. lib. 2, cap. 45, vers. Pungit pro hac sententia; Marta vot. seu dec. 206, n. 10; Panimoll. dec. 86, n. 27 et seq.

[1] ut in nostris terminis.

Authorities

Giurba, cons. 86, often cited, is the case of Sylvester Cardili. In n. 20 he says: "A personal injury is one inflicted upon the person. A real injury is that by which the person is not directly injured, but one's honor, as in the case of a husband whose wife commits adultery, or that of a brother whose sister has been violated, or that of a father whose daughter has been deflowered. A personal injury should be repelled forthwith (incontinenti); a real injury, although the law permits it to be avenged forthwith, is understood to be avenged as soon as possible,

as the same motive is always present, as if the man had been detected in flagrante, unless some other reason should appear."

The citations from Joannes Franc. de Ponte and Sanfelicius were previously referred to by Spreti in § Nec verum est, XXVI, 28, ante sec. 12; the note there gives other references. These authorities and Panimolla, dec. 86, draw the distinction between injuries real and personal. Sanfelicius says, dec. 337, n. 87, that when a crime is committed by which the person of another is not directly affected, but his honor is injured as in the case of a husband, it is called a real injury "because my res, which is my honor, is stripped from me by reason of the injury done by the adulterer;" and this, he says, may be recovered if there is no protracted delay.

Marta vot. 206, n. 10, is cited ante § Nec verum est, vers Novar. in Summ., XXVIII, 29, ante sec. 31. See as to real and personal injuries Bartolus in l. 3, § Eum igitur ff. de vi et vi armata., Dig. 43, 16, 3, 9, cited by Bottini in § Caeterum, CLXXXII, 188, post sec. 86; Raynaldus Vota XX, n. 5; Matthaeu et Sanz, cont. 29, n. 42; as to terms Real and Personal in English law, see 4 Law Q. R. 394. The difficulty attending the distinctive use of real and personal is illustrated in Johnson v Bradstreet, 87 Georgia 79, quoted in Love v Tioga, 68 Penna. Sup. Ct. 450, when in holding that a libel was a "personal injury" the Court said, "Reputation is a sort of right to enjoy the good opinion of others and is as capable of growth and *real* existence as an arm or leg."

Section 40.

[Arch., Pam. XVII, 17, § Similiter nil, vers. Sanfaelic. dicta.]

See Sanfelicius dec. 337, n. 58 at the end, 59 and 60, where although the husband might have killed his wife immediately, he did not do so, but by dissembling, he delivered himself from disgrace by killing his wife as soon after as possible; and n. 90 about the end. And see Giurba cons. 86, n. 19 and 21, where [it was so held] because the question concerned not a personal but a real injury as is said above.

Authorities

This point, introduced incidentally by Archangeli at the end of § Similiter nil, is somewhat elaborated by Spreti, XXIX, 30, § Suppetit quoque, ante sec. 39. Archangeli's reference "ut supra dictum est" seems to imply that the argument had been previously suggested by

him. The reference is most probably to § Praeterea est, XV, 16, post sec. 46. See also § Et licet Farinacius, XLV, 44, Ch. X, sec. 6.

The cases here cited, especially that from Giurba, are referred to in a case decided in 1658, reported in Raynaldus Vota 20, n. 5, a posthumous work published in 1735. This distinction between real and personal injuries seems very strange to a common lawyer. Mr. Pound points out, 28 Harvard L. R. 445, that the primary meaning of injuria was insult, and the primitive tendency was to treat all wrongs as injuries to personality, and all injuries to personality as insults; and so insultus came to have the double meaning of insult and assault. It would appear more natural to consider an insult or injury to honor as personal, but the importance attached to honor seems to have led the law to consider one's honor as a thing having separate and real existence.

SECTION 41.

[ARCH., PAM. 1, XIII, 14, § RELAXATIO HABAENARUM.]

The "loosening of the reins to husbands,"[1] so that they might declare the law for themselves, would only be worthy of consideration[2] if the law of Repudium[3] were still in force; for in that case it should not be permitted to husbands to declare the law for themselves for the sake of the reparation of their honor, because they could take care of themselves well enough in another way, namely, by their power of sending away and repudiating the polluted wife. In this manner they could cast far away from themselves the cause of their dishonor, nay more, the disgrace itself. But after by Divine favor our Gentile blindness has been removed, and marriage acknowledged to be perpetual and indissoluble, they are most worthy of pity who, every other way being closed to them, wash away their stains in the blood of their adulterous wives, which thus affords a sacrifice to their honor.[4] [See] Petr. Erod. Rer. Judicat. lib. 8, tit. 1, de Adulter. cap. 1, where, after he treated a subject of this kind according to the practice of the Roman law, he adds at the end: "For the hope of a second

marriage having been taken away so long as the adulteress survives, we think it too hard that such very just resentment should only be extinguished after so long a period of time.[5] Therefore let [that resentment] which is not ended by divorce be brought to an end by homicide, as Augustine says, so that which is not lawful, becomes lawful; that is, let one woman be killed in order that another woman may be married.[6]

[1] relaxatio habaenarum; an allusion to the argument on the other side as stated in § Quibus praehabitis, XI, 13, ante sec. 10, and by Bottini in § Nimis autem, CLXXXII, 187, Ch. V, sec. 34. [2] considerabilis, Mr. Hodell translates: "would indeed be too great." [3] See Hunter Roman Law, p. 508. This is a strong argument. [4] honori suo litando; Mr. Hodell translates: "when all way of recovering their honor was closed to them." Aerodius says: durius esse existimamus, justissimum dolorem nisi tanto tempore non extingui." [5] That is, not until after the death of the adulterous wife. [6] quod non licet, ut liceat, hoc est uti altera ducatur, altera occidatur. Mr. Hodell translates; "what is not permitted becomes as if it were permitted; that is, let the adulteress be killed, that the husband may be released." The quotation is in full: "Itaque qui divortio non terminatur, terminatur homicidio. Fit (inquit Augustinus) quod non licet, ut liceat, hoc est, uti altera ducatur, altera occidatur."

AUTHORITIES

This passage from Aerodius is quoted in Dondeus, cons. 97, n. 7. The reference to St. Augustine I have not been able to verify in his works. Aerodius does not give it. Petrus Aerodius, or Pierre Ayrault, a learned civilian of the 16th century, and Deputy Judge in Criminalibus at Angers, born 1536 and died 1601. Nypels, Bibliothèque Choisie, § 573, gives an account of him.

The early Roman law of Repudium or rather Divortium was the dissolution of marriage at the will of either or both parties, Dig. 50, 16, 101, 191. Repudium was strictly the dissolution of an agreement of betrothal but was sometimes, as here, used broadly of divorce inter conjuges, gl. in rub. and gl. 1, in l. 4 de divortiis. By the Canon law divorce was not granted except for just cause of consanguinity, and then there was strictly a decree of nullity, gl. in l. divortio de neg. gest. (Dig. 3, 5, 34 [35]). Cf. § Imo si, CXV, 123, Ch. VIII, sec. 60, vers. Quam distulit, as to the suggestion that Guido supposed that he might possibly have a right to have the marriage annulled, on the ground of mistake as to the person of Pompilia, being then ignorant of the Canon law on the subject.

There was a right on the wife's part to a divorce, i.e., separatio thori only, by reason of the husband's cruelty, or adultery, in which case the wife was entitled to alimony. Pompilia's suit for divorce was probably brought on this ground. Farinacius, dec. 135; dec. 131; dec. 156, n. 3; dec. 193, n. 5.

Section 42.

[Arch., Pam. 1, xiii, 14, § Fateor esse.]

I acknowledge that it is praiseworthy to curb the presumption of husbands lest they should lay down the law for themselves in their own cause,[1] since possibly they may be deceived, but it would certainly be more praiseworthy to restrain the lust of wives;[2] for if they would behave themselves modestly and live chastely, they surely would not drive their husbands to this kind of — I had almost said necessary — crimes; and we cannot deny that from the disgrace brought upon them by the adultery they are exasperated, and are driven insane, and their hearts are stirred with a most just resentment, which exceeds every other without comparison, and therefore deserves greater pity, according to the verse of the satirist:

> "Exigit iste dolor plus quam lex ulla dolori,
> Concessit."[3]

[1] ne in propria causa jus sibi dicant. [2] cohibere salacitatem uxoribus. [3] "This resentment exacts more than any law has conceded to resentment." Probably a quotation from memory, of Juvenal Sat. X, 315.

> "exigit autem
> Interdum ille dolor plus quam lex ulla dolori
> Concessit."

Translated in Loeb library, "And sometimes the husband's wrath exacts greater penalties than any law allows."

Section 43.

[Arch., Pam. 1, xiii, 15, § Quod bene agnovit.]

And Papinianus clearly recognized this in *l.* Si adulterium cum incoestu, § Imperatores ff. ad

Jul. de adulter. [Dig. 48, 5, 39 (38), 8], where we read, "Since it is most difficult to restrain just resentment;" l. Gracchus Cod. eod. [Cod. 9, 9, 4]. For which reasons the authorities maintain that just resentment mitigates the penalty even in premeditated crimes, because just resentment does not readily subside, nor does it lose its strength by the passage of time, but just like disgrace[1] incessantly pierces the heart, and the longer the disgrace continues, so long does the resentment itself continue, nay rather it increases. Afflict. super Constit. Regn. Neap. lib. 3, de poena uxorum in adulterio, Rub. 46, n. 1, in fin. and n. 2; Facchin. cons. 36, n. 11, lib. 2; Caball. resol. crim. cons. 300, n. 66 [6].

[1] infamia; perhaps used technically.

AUTHORITIES

The ll. Imperatores and Gracchus are to be found in the Appendix. Caballus, cas. 300, frequently cited, discusses in n. 6 the lex Julia, § Imperatores. Facchinus, book 2, cons. 36: "Defense of homicide from the death penalty for various causes" in n. 11 includes "just resentment" of a husband as mitigating the penalty. de Afflictis Super Const., Book 3, Rub. 46, previously cited.

SECTION 44.

[ARCH., PAM. 1, XIV, 15, § EO INTENSIUS IMPELLIT.]

And this resentment impels the more violently in proportion as wives with greater impunity, as I may say, pollute their marriage obligations and defile the honor of the entire household. In old times while the Lex Julia was in force, wives who polluted the marriage bed used to undergo the death penalty; l. quamvis la. 2, C. ad leg. Jul. de adulter. [Cod. 9, 9, 29, § 2]; l. transigere C. de transact. [Cod. 2, 4, 18]; § Item Lex Julia de adulteriis, Instit. de public. judic. [Institutes 4, 18, 4].

In like manner it has been ordained in the Holy Scriptures, for adulterous wives were stoned to death, Genes. cap. 38 [24?]; Levit. cap. 20, vers. 10; Deutheronomi, cap. 23 [22], vers. 22; Ezecchiel, cap. 16 [38 etc.].

Section 45.

[Arch., Pam. 1, xiv, 15, § Solatium ex publica.]

The solace derived from public vengeance would quiet[1] the resentment and blot out the disgrace. The husband, restored to his original freedom, could take a new but chaste wife, and raise his children in honor. But now in our evil times, on account of the deplorable[2] frequency of [this] crime everywhere, the rigor of the sacred laws being obsolete, when wives who lead disgraceful lives are treated in the mildest manner, the condition of husbands would be most unfortunate if either they had to live forever with their disgrace, or its abolition,[3] by means of the death of the wife,[4] would have to be expiated by the punishment of death;[5] as is well considered by Matthaeu de re Crim. contro. 12, n. 27.

[1] sedabat. [2] deplorabilem. [3] illius abolitio; i.e., the abolition of the infamia; Mr. Hodell translates: "or must expiate her destruction when she is slain, by the death penalty." [4] morte uxoris mediante. [5] ultimo supplicio.

Authorities

Matthaeu et Sanz, cont. 12; the case of Franciscus Palomeque.

Section 46.

[Arch., Pam. 1, xv, 16, § Praeterea est.]

Moreover it is very worthy of consideration that one may with impunity kill his enemy for the protection of his own person,[1] but [he must do so]

immediately and in the very act of the assault, not however after an interval. [And the reason is] because the life of a man who is killed is not restored by taking the life of the man who killed him. Hence whatever follows after the [time of the] first homicide tends towards vengeance, which is hateful and odious to the law, because the jurisdiction of the Judge is injured in every way by taking away his power of publicly avenging the homicide. But if the man who was killed could be called back to life by the death of the man who killed him, I do not think it doubtful[2] that any one might lawfully kill the said murderer, because that would not be vengeance, but nothing more than an act of defense, tending to the recovery of the life that had been taken away. — Yet [even] where we are concerned with an offense and injury not touching the person of the injured party [the same principle applies] just as it is permitted to one who suffered a theft to kill the thief in order to recover the goods that were stolen, even after an interval, whenever every other way of recovering them is shut off. Farinac. qu. 125, n. 216 [170]. So likewise[3] one who is injured in his reputation ought at any time to be permitted to kill the person who injures him, for he is said not to avenge his injury, but to repair his damaged honor, which could be made whole in no other way, as Dondeus reasons in said consult. 97, n. 15 and 16; and Sanfelicius expresses the same opinion in said dec. 337, n. 47 to 49 et seq. and n. 87.

[1] pro tutela sui corporis. [2] dubitabile. [3] pariformiter.

AUTHORITIES

The reference to Farinacius appears to be qu. 125, n. 170, where he lays it down as the better and more generally accepted opinion that it is lawful in defense of one's property to kill a trespasser whenever

other defense or recovery of the goods is not possible, although the owner of the goods is not placed in peril of his own person. Many authorities are cited on both sides of the question.

Sanfelicius, dec. 337, n. 48: "Also, whenever one is injured in his honor, he seems to have been despoiled of it by the offender, and just as any one can recover, as soon as he is able even after an interval, the possession of his goods, of which he has been despoiled; so also he may recover his honor of which he has been despoiled, and since this is done by permission of the law, whoever does it seems to act as the minister of the law, as I have often said, * * * and if this is permitted in the case of goods which are considered in law as the secondary blood of a man, how much more should this be said in the case of that which is considered of more value than one's own blood by which life is sustained, if the causa honoris is greater than that of life; hence our Lord said 'I will give my honor to no man,' and if the causa honoris is adjudged greater than that of life, if life is defended incontinenti, honor can be defended even after an interval." Dondeus, cons. 97, is to the same effect. Archangeli used this excellent consilium freely for his argument.

> "Who steals my purse steals trash;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed."
>
> *Othello, Act III, Scene 3*

Section 47.

[Arch., Pam. 1, xv, 16, § Ultra quod.]

Furthermore, as I have said, when we are arguing about the defense of one's life, we are arguing about an instantaneous act,[1] and therefore the anger conceived therefrom ought to quiet down after a while, according to the warning of St. Paul to the Ephesians 4 [26], where he says, "Let not the sun go down upon your wrath." But when we are discussing an offense[2] that injures the honor, this is not momentary,[3] but has a protracted continuance,[4] nay rather, with the lapse of time, it becomes so much the greater as the injured person is the more despised; and so whenever the homicide follows, it is always said to have been committed immediately;[5] Sanfelicius in said decision 337, n. 50, besides the other authorities cited.

[1] de actu instantaneo. [2] sumus in offensione. [3] momentanea, apparently synonymous with instantaneus. [4] or successive progress. See note § Quemadmodum, XXIX, 30, ante sec. 37. [5] immediate; for immedietate, D'Arnis; not here for immediate, without premeditation. Cf. incontinenti, § Quemadmodum, XXIX, 30, ante sec. 37.

AUTHORITIES

Sanfelicius, dec. 337, n. 50. "But whenever anyone is offended in his honor, this offense has a protracted continuance (haec offensio tractum habet successivum as quoted by Archangeli) because honor is continually (semper) injured by the offense, and so if it is continually injured, and anyone is injured in his honor, therefore its defense ought to be understood as continually permitted, and also the avenging of the offense and the repelling of the injury are always permitted, and no time prescribed for repelling the offense, except for delay as appears from our statute, and therefore on all accounts the alleged homicide should be held to have been committed without liability for punishment." Spreti in § Quemadmodum, XXIX, 30, ante sec. 37, has a similar reference.

The advice of St. Paul, "Be ye angry and sin not; let not the sun go down upon your wrath," seems to be understood as an Apostolic suggestion to take vengeance before anger has had time to cool. Raynaldus Vota 20, n. 10, cites this passage of St. Paul and also Deuteronomy, ch. 19, permitting the avenger of blood while his heart is hot, to pursue the slayer. Raynaldus says that as a rule anger ceases after twelve hours, adding that he who entertains hatred yesterday or the day before cannot be said to kill in anger. This subject is discussed in Rot. Genuen, vot. 12, n. 7, in appendix to Censalius in Si quis Imperatori Maledixerit.

SECTION 48.

[ARCH., PAM. 1, XVII, 17, § SIMILITER NIL.]

Likewise it does not at all disturb [our argument] that Guido could have killed his wife and her adulterer in the very act of their elopement when he found them in the Inn at Castelnuovo, but that he preferred rather to have them imprisoned, bringing suit to have them punished by the means of the law and not by his own act.[1] For we deny that he could safely have killed either of them,[2] because he was alone, nor could he attack them without danger of life, since the lover was

powerfully strong, by no means[3] timid, and all too ready to resist, for in the words of one of the witnesses in the Prosecution for Elopement, he is called "cut throat" (scapezzacolla). Nor is it credible that unless he had been bold and undaunted,[4] he would have undertaken so great a crime, or would have dared to take part in the elopement, and to accompany the fugitive wife from the home of her husband. And this is more clearly proved from one of his letters in which after urging Francesca to mix a narcotic drug in the wine flasks in order that her husband and the servants should be overcome with sleep, he adds that, in case[5] they should have suspected the plot prematurely,[6] she should even open the door,[7] for he would either suffer death with her, or would snatch her from their hands;[8] which things indicate audacity and courage. And although the wife was a woman, that is, peaceful and timid, nevertheless Francesca was impudent and bold beyond measure, either because of her hatred for her husband, or because of her anger caused by the imprisonment of her lover; for she drew a sword against her husband in the presence of the police officers[9] who were about to imprison her. And to prevent her from going further it was necessary for one of the bystanders to snatch it from her hands. Therefore Guido was not able before their imprisonment to carry into effect[10] that which he had intended, and which was lawful for him to do, because he was alone and his strength was unequal [to theirs]. After she had been taken away to prison, and subsequently had been placed in safekeeping,[11] it was impossible for him to vindicate his honor; but after she had left the monastery,[12] and had been taken back to the home of Pietro and Violante, he

took vengeance at the first opportunity; therefore he is considered as if he had killed her in the very act and immediately. See Sanfelic. in said decision 337, n. 58 at the end, and 60, where although the husband might have killed his wife immediately he did not do so, but by dissembling he delivered himself from disgrace by killing his wife as soon after as possible; and n. 90, about the end. And see Giurba cons. 86, n. 19 and 21, where [it was so held] because the question concerned not a personal, but a real injury as is said above.[13]

[1] jure medio et non de facto. [2] utrumque, Mr. Hodell translates, "both of them." See § Quoniam, CXIII, 121, post sec. 51. [3] nunquam. [4] animosus; see Glossary. [5] quatenus. [6] praesensissent. [7] aperiret quidem Januam; perhaps expressive of indignation. [8] Caponsacchi's letter to Pompilia, XCVIII, 105. [9] Birruariis. [10] ad effectum perducere. [11] in conservatorio deposita. [12] e monasterio exgressa. [13] The last part of this section may be found repeated in another connection, ante sec. 40.

AUTHORITIES

These have been cited frequently in other sections.

SECTION 49.

[ARCH., PAM. 1, XVII, 18, § CURAVIT EIUS CAPTURAM.]

[Guido] brought about[1] her arrest, and demanded[2] that she be punished, lest she should continue her adulteries and shameful conduct, and was unable to carry out the other course, because his confusion of mind, his feeble rage, and his feeling of shame controlled him, and forced him, without reflection, not to take the law into his own hands, to recover his lost honor. He did indeed make legal complaint, but that was because he could not kill her; and his disgrace would not have been wiped out, nor his infamy abolished by her imprisonment and punishment, nay rather, since after her imprisonment

he was the more excluded from the company of the nobility, his injury kept always growing more acute, and it stimulated him more keenly to regain his reputation. His bitterness of mind kept especially increasing, upon his learning[3] that she had gone back to the home of Pietro and Violante, who had declared that she was not their daughter, but the child of a dissolute woman; hence his injury was increased by her staying in a home that he suspected, as is said a little further below. Accordingly the same cause kept urging him on as well after she left the monastery, as before her imprisonment and the suits[4] brought by Count Guido.

[1] curavit. [2] instetit [institit]; used technically of a plaintiff or prosecutor like instans and instantia, see the last line of this section. Mr. Hodell translates "insisted." [3] praesentiendo. Prae seems here to have no special force. [4] instantias. Mr. Hodell translates "appeals."

Section 50.

[Arch., Pam. 8, cxiii, 121, § In nihilo refragante.]

There is no force in the reply[1] that he did not kill his wife and her adulterer when he had overtaken them at the inn of Castelnuovo, but indeed brought about their imprisonment, as though after this recourse to the Judge he could not avenge his honor by his own act.[2]

[1] In nihilo refragante; participial ablative absolute, used for direct statement. Refragor, correlative to suffragor. [2] de facto as opposed to de jure.

Section 51.

[Arch., Pam. 8, cxiii, 121, § Quoniam toto coelo.]

Because we absolutely[1] deny that he was able to kill either of them, for he was either worn out by

the hurried journey, or was so confused by his mental agitation that he was seized with a fever, and besides that, he had learned beforehand[2] that the said Canon[3] was furnished with firearms,[4] as he himself[5] averred in the Prosecution for Elopement, at a time which of course is not suspicious, because the homicides had not then been committed.[6] Moreover the said Canon was a terrible fellow, as is testified by a witness for the Fisc, page 167, and as Francesca herself confesses, in our Summary, Number 2, Letter C.[7] In another place [the Canon Caponsacchi] was accused of having discharged an arquebus[8] at the police officers, as he himself avers, page 71. And moreover the Canon was entirely too ready and disposed to resist, as in Letter 18, where he is speaking of the sleeping draught to be given to the household to drink, he adds there: "If by ill luck they shall find it out, and shall threaten you with death, open the door that I may die with you, or free you from their hands."[9] And the wife was truly intrepid, menacing, enraged and furious, as the event showed, since when the Canon was brought back into the custody of the Court,[10] she dared, in the presence of the police officers and the witnesses, to make an attack upon her husband with a naked sword, whom she would readily[11] have killed, had not she been hindered, page 50. He indeed, infirm[12] and unequal in strength to them, was not able to take vengeance by killing either one of them,[13] provided as he was with only a traveller's sword.[14] In this confusion of mind he brought about her imprisonment, so that as he was not able to kill them, he might avoid the continuance of his disgrace, and in this way prevent their future adultery. Yes, indeed, if[15] he could have

killed them, and did not kill them, he would be praiseworthy; because so far the adultery had not been made notorious[16] by the sentence of the Judge, and only strong suspicions of it were urging him on.

[1] toto coelo, Mr. Hodell translates: "in the face of all heaven." See Glossary. [2] praesenserat. [3] ecclesiastinum for ecclesiasticum. [4] armis sulphureis. [5] that is, Guido. [6] This testimony in the Processus Fugae being before the commission of the homicides, was the more entitled to credence. [7] scapezzacollo in § Similiter nil, XVII, 17, sec 48. Pompilia's deposition, LXXXIV, 93. [8] alias inquisitus pro exoneratione archibusiatae in birruarios; Mr. Hodell translates: "Elsewhere the accused speaks of the taking away of an arquebus pointed at the officers." Exoneratio, see Glossary. [9] XCVIII, 105. [10] dum redacto in posse Curiae Ecclesiastico coram Birruariis; Mr. Hodell translates: "Since when captured by the posse of the Ecclesiastical Court she dared," etc. In posse: into the power or custody of the Court. Ecclesiastico, meaning Caponsacchi, is ablative absolute with redacto. The Court, of course, was not the ecclesiastical court at all. [11] de facili. [12] invalidus; perhaps as in English an invalid. Archangeli says above that Guido had a fever. [13] utrumque vel istorum alterum; Cf. utrumque, § Similiter nil, XVII, 17, note 2, sec. 48. Mr. Hodell translates: "both or either of them." [14] ense viatorio instructus; see Bottini as to this, § Multoque minus, CLXXXIII, 188, sec. 89. [15] quoties; see Glossary. Perhaps "if at any time." [16] notorium; by matter of record. Archangeli in this last part of this section really weakens his argument.

Section 52.

[Arch., Pam. 8, CXIV, 122, § Quo vero.]

But as to the recourse to the Judge, since[1] it might be asserted that he thereby gave up his right of killing his adulterous wife (which we deny), I beg that it be observed that the Court acted prudently in placing Francesca in a monastery, so that she might live[2] there more respectably than in a prison, and afterwards, having seen the affidavit of the physician as to her sickness, so that she should not stay there destitute of the necessary attention, and thus suffer punishment while the case was

going on[3] (which is everywhere avoided),[4] and after having obtained[5] the consent of the Abate Franceschini, the brother of the accused, [the Court acted prudently likewise] in giving leave[6] that she should be placed at the home of her parents, under bond[7] to keep the same as a prison.

[1] quando. [2] conversaretur, not conservaretur; Mr. Hodell translates, as if the latter word, "might be kept there." [3] subirit in procedendo poenam; Mr. Hodell translates: "might undergo punishment in the very course of events." [4] a qua ubique locorum receditur. [5] attento consensu; in the O. Y. B. attento generally means "having been considered," and it may mean this here. [6] The syntax of this passage is ungrammatical, the sense is clear. [7] cum cautione; Mr. Hodell translates: "with the warning."

Section 53.

[Spreti, Pam. 9, cxxxi, 138, § A qua quidem.]

Nor indeed can we recede from this opinion[1] in the present case on account of the fact that Count Guido did not kill his wife in the act of apprehending her in her elopement with her lover, but was even content to accuse her before the Judge as an adulteress; because it would not have been safe for him to kill her then, for he was alone, while she was in the company of her said lover, a strong young man, vigorous, provided with arms, and accustomed to criminal deeds; and what is more, ready and prepared to resist, lest his beloved Amaryllis should be torn away from him, just as she also was herself ready and prepared to obstruct [her husband] even with a sword that she had seized and unsheathed, so that her dear Myrtillus should not be struck.[2] Guido should not therefore be considered to have spared her, nor to have passed over the injury, but when (lest she might escape into more distant regions where he could have no hope of the vengeance that was deserved[3]), his just and

sudden resentment then counseled him to cause her arrest[4] by the police officers, so that he might kill her at the first opportunity on the happening of a convenient occasion after a while; if he then kills her, he should be considered as if he had killed her immediately; see on this point;[5] Ruin. cons. 2, n. 7, vers. Si maritus occiderit uxorem, lib. 5; Giurb. cons. 86, n. 19, vers. Sic maritus, etc., and n. 21; Jo. Franc. de Pont. cons. 98, n. 24 et seq., as far as n. 33, vol. 1, repeated under Sanfelic. dec. 337, n. 81 et seq., as far as n. 90; Prat. respons. crim. 25, n. 31 et seq.; Cabrer. de met. lib. 2, cap. 45, n. 13, vers. Celebris succedit Quaestio, and vers. Realis est; Paschal. de patr. potest. par. pr. cap. 5, sub n. 3; Matthaeu de re Crimin. contr. 12, n. 28; Novar. in Summ. Bullar. par. pr. Commentar. 72, n. 81, vers. Ex quo Adulterio; Polic. de Reg. Aud. To. 2, tit. 10, cap. 7, n. 29, vers. Quemadmodum tunc dicitur incontinenti; Marta vota seu decis. 206, n. 7 and n. 10, especially in vers. Sed quando committitur; Muta decis. Sicil. 61, sub n. 11; Gizzarell. decis. 18, n. 5, and on that passage, Baldax. de Angel. n. 4 and Didac. de Mari. sub n. 7; Panimoll. dec. 86, n. 29, and in the two following sections.[6]

[1] This section in Spreti's argument follows § Subsistente, CXXXI, 138, ante sec. 14. [2] ut Mirtillus non offenderetur; Mr. Hodell translates: "Lest her beloved Mirtillus might be offended." [3] sine spe debitae vindictae; or "due to him." [4] consuluerit eam arrestari facere. [5] in puncto. [6] This section of Spreti's argument is referred to by Bottini, § Multoque minus, CLXXXIII, 188, post sec. 89.

AUTHORITIES

Most of them in this general résumé have been cited elsewhere. Ruinus, book 5, cons. 2, see § Placeat interim, CXIV, 123, post sec. 58. Jo. Franc. de Ponte., cons. 98, n. 24, see § Nec verum est, XXVI, 28, ante sec. 12, § Suppetit quoque, XXIX, 30, ante sec. 39, § Praedictis nullatenus, XXXII, 32, post sec. 63. Marta, vot. 206, vers. Sed quando, supports the text. See § Nec verum est, vers. Novar., XXVIII, 29, ante sec. 31.

Paschalis de viribus Patriae Potestatis, part 1, ch. 5, n. 3, speaking of the right of a father to kill his adulterous daughter "incontinenti," mentions a case where the daughter escaped, and the father after six months of preparation followed and killed her. As he could not reach her before, he was held to have acted "incontinenti." Caesar de Panimolla, dec. 86, is cited ante § Nec verum est, sec. 33. In n. 29, here cited, he says "incontinenti" should be understood "as soon as it may be done conveniently and opportunely;" for the reason is always the same as if the offender were caught in the act. Matthaeu, contr. 12, n. 28, is the case of Franciscus Palomeque. Novar. in Sum. Bull. and others are quoted in § Nec verum, vers. Novar., XXVIII, 29, ante sec. 31.

Section 54.

[Spreti, Pam. 9, cxxxii, 138, § Et generaliter.]

And, in general, that whatever is done after an interval may be said to be done immediately,[1] if it has been done as soon as an opportunity was offered for doing it, is [shown by] the Text in l. 2, § confestim, where we read: "'Immediately' moreover shall thus be understood, 'as soon as he was able'," ff. ad Sen. Consult. Tertullian [Dig. 38, 17, 2, 43];[2] Bellon. de potest. eorum quae fiunt incontinenti, lib. 1, cap. 6, n. 5, and in a number of sections following.

[1] incontinenti. [2] "confestim" autem sic erit accipiendum, "ubi primum potuit."

Authorities

Bellonus de Potestate, book 1, ch. 6, so holds in reference to retaking possession of property, time being allowed for preparation. He instances cases where long intervals of time had elapsed.

Section 55.

[Spreti, Pam. 9, cxxxii, 139, § Et tantum abest.]

And so far is the law from presuming[1] that this injury was passed over by the husband, that on the contrary[2] it supposes[3] that the purpose of revenge always continues in him; from which[4] it results that

a wife should even be held to look out for herself, so much so that her death following thereafter, is never said to be treacherous; Mastrill. ad Indult. Gener. cap. 29, n. 6, vers. Sed quid si maritus; Novar. in Summ. Bullar. in said first part Comment. 72, n. 81; Donde. consult. 97, n. 16, vers. Alioquin; on which point Muta, decis. Siciliae 61, throughout, lays also much stress,[5] where there is the case of a husband who caused his wife to be called by his son outside of the city walls, in order to kill her there safely, and yet the husband was only sentenced to the galleys for seven years.[6]

[1] praesumat; Mr. Hodell translates "believing." [2] ut imo. [3] credat. [4] ex quo; see Glossary. [5] ad quod multum facit Muta. [6] This section is referred to by Bottini, § Absque eo quod, CLXXXV, 190, post sec. 93.

AUTHORITIES

Mastrillus ad Indult., ch. 29, n. 6; Dondeus, cons. 97, n. 16, and Novarius P. 1, comment. 72, support the text. Muta, dec. 61, the case of Leonardus, often cited, is more fully quoted in § Agnoscit Fiscus, CXXXIV, 140, Ch. X, sec 1. See also § Nec verum, vers. Novar., XXVIII 29, sec. 31.

SECTION 56.

[SPRETI, PAM. 9, CXXXIII, 139, § ET FACIT ETIAM.]

And [this decision of Muta] also shows[1] that which other authorities lay down,[2] namely, that a husband can conceal his wife's disgrace, in order to take vengeance upon her safely afterwards; Jo. de Amic. cons. 4, n. 4; Anonym. apud Sanfelic. in said dec. 337, n. 37 at the end, and n. 59; Dond. consult. 97, n. 16; just as he may make his wife conceal it,[3] in order that he may securely take vengeance upon the man who plans to injure her virtue, according to the very celebrated[4] consilium of Castrensis 277, lib. 2.

[1] Et facit etiam id. Cf. ad quod multum facit in preceding section. [2] Mr. Hodell translates: "This also makes some

difference in the case that certain authorities hold," etc. [3] potest illam dissimulari facere per uxorem. [4] famigeratissimum; "Post Augustan and very rare."

AUTHORITIES

Joannes de Amicis, cons. 4, n. 4, and Paulus Castrensis are cited in Sanfelicius, dec. 337, n. 37, where an Anonymous Doctor, one of the three counsel "of the first class" who argued for the defense, says: "He used all his diligence that he might have the adulterer in his hands to take vengeance upon him, he sent out spies, nor did he omit doing anything that a man could have done as in honor bound, even by concealing his own disgrace to the end that the adulterer might return to his own home in security, and that the said husband might take his lawful vengeance with no protracted delay, which dissimulation is allowed." The facts in Paulus Castrensis, cons. 277, appear to be that by command of the husband his wife pretended to listen favorably to her intending seducer, and appointed an hour for him to visit her; the husband assembled his brothers and brothers-in-law armed with clubs and beat the unwelcome visitor soundly when he arrived. He defended himself with a ronchonus (a curved hedging knife?) and cut off the finger of the woman's brother, who killed him and escaped. Castrensis argued in favor of the mitigation of the husband's punishment. This is also cited in § Quae benignior, XVI, 17, post sec. 62.

Paulus Castrensis (de Castro) studied under Baldus, and by great ability rose from obscurity to distinction as a teacher and writer. He drafted the statutes of Florence and became Senator there and afterwards at Bologna. He died in 1420, or Calisse says in 1441, attaining such reputation that some classed him with Bartolus, the proverb being: "Si Bartolus non fuisset, ejus locum Paulus tenuisset," and "Qui non habet Paulum de Castro, tunicam vendat et emat."

SECTION 57.

[ARCH., PAM. 8, CXIV, 122, § SED LAUDARE NON POSSUM.]

But I cannot commend him, whoever he may have been, who undertook to drag Francesca out of the monastery on the false pretext of her illness, since he could more decently and lawfully have accomplished his purpose by disclosing the truth, namely, her urgent pregnancy;[1] but this was done for no other reason than that either [first] his son might be hidden from Guido (since the law presumes that the son was begotten by his legal

father, although the wife had shown herself incontinent),[2] or else [secondly] that Francesca, believing that she had conceived by another man than her husband, concealed[3] her pregnancy[4] so far as she was able.[5]

[1] ob praegantiam et urgentem uterum. [2] according to the maxim, "Pater est quem nuptiae demonstrant." [3] palliavit: covered with a cloak. [4] gravidantiam. [5] pro posse; Mr. Hodell translates "possibly." Posse, infinitive, regularly used as noun meaning power or ability.

Section 58.

[Arch., Pam. 8, cxiv, 123, § Placeat interim.]

In the meantime, may it please my most illustrious Lord, to turn his eyes a little while towards Arezzo, and for a few minutes contemplate Count Guido stained with infamy, when there reached his ears the decree for the condemnation of the adulterer,[1] the adulteress being still unpunished. Not knowing that on account of her pretended ill health she could not have been punished, and that during her confinement,[2] which had been purposely concealed from him, she was incapable of punishment,[3] seeing moreover that Francesca had returned to that most suspicious[4] home of Pietro and Violante, who had inspired Francesca with infidelity, who had repudiated her, and had declared that she was the daughter of a prostitute — Guido lost all patience, as appears from the deposition of Blasius, page 318, where we read: "But still further she had been received back into the home, after she ran away from Guido, although the latter had put her in a monastery;" and this[5] [patience thus] changed to desperation, compelled the unfortunate husband to act at length the part of a gentleman,[6] and therefore his recourse to the

Judge ought not to increase his punishment, as on this point is said by Ruinus cons. 2, n. 7, vers. Si maritus occiderit uxorem, book 5.

[1] adulteri; Mr. Hodell translates "adultery." [2] in puerperio. [3] incapacem esse poenae; Mr. Hodell translates: "was unsuited to the vengeance of the sword." [4] suspectissimam; suspectus, originally, looked up to, respected, completely reversed its meaning. [5] quae conversa in desperationem. Quae relates to patientiam. Mr. Hodell translates: "This change drove to desperation." [6] ad tanquam honestum esse; Mr. Hodell translates: "who was at least an honorable man."

AUTHORITIES

Ruinus, book 5, cons. 2, n. 7, supports the text, though the case was of a different character.

SECTION 59.

[ARCH., PAM. 8, CXV, 123, § NON NEGAMUS.]

We do not deny that the Abate Franceschini had given his consent to the restoration of Francesca to the home of Pietro and Violante (that I may defer to the religious scruples of my lord the Advocate of the Fisc),[1] but at the most by word of mouth, because I have not been able to see it in writing. But for our purpose this does not affect Count Guido, since it does not appear that he was informed[2] of such consent, and in so far as[3] the Fisc presumes that he was instructed by the Abate Franceschini, his brother, of the said consent, we shall be obliged to affirm either that [such] knowledge is not presumed (as is shown below) or that at the very worst[4] there only existed presumptive knowledge; and I do not think that the death penalty can be imposed by reason of presumptive knowledge of this kind, and Guido condemned, since he has not confessed such knowledge or has been convicted of it. Cap. Nos in quemquam 2 quaest. 1 [Decretum part 2, caus. 2, Quaest. 1,

cap. 1] where we read: "We cannot pass sentence on any one unless either he has been convicted or has voluntarily confessed."

[1] Mr. Hodell translates: "in order that we may yield to our respect for my Lord," etc. The allusion is evidently to Bottini's argument as to the religious sentiment guarding the home, § Plurimum, LXXIX, 86, Ch. X, sec. 75, and § Quibus accedit, CCII, 206, Ch. X, sec. 80. [2] fuisse certioratum. [3] quatenus. [4] ad omne peius.

SECTION 60.

[ARCH., PAM. 8, CXV, 123, § IMO SI D. GUIDO.]

Nay more, if Count Guido had confessed that he knew[1] that this consent had been given by the Abate, his brother, yet, since the latter[2] had not a special power of attorney to give it, nor a general power to conduct litigation, but merely one for receiving the money which Francesca had taken away from Guido (as may be seen on page 136),[3] the Abate by exceeding the limits of his authority would have exasperated Guido's mind; and the unfortunate man also would have so burned with rage at the temerity of Francesca, Pietro, and Violante that he would be dragged, I might almost have said by force, to take vengeance. This he deferred as long as he had any hope of dissolving his marriage by reason of the error committed as to the person, being ignorant of the point of Canon law, namely, that error as to the status[4] of the person does not make the marriage contract void, but only error as to the individual;[5] Tancred. de matrim. lib. 7, disput. 18, n. 8.

[1] fassus esset scivisse; Mr. Hodell translates: "Indeed what if Count Guido had acknowledged that he had written the consent furnished by the Abate;" as though the word was scripsisse. [2] istae; for iste, that person. [3] Unfortunately we have not the record here cited, and it is impossible to understand this reference and others in the O. Y. B. to the power of attorney given by Guido

to Paolo. The power, dated October 7, 1694 (CLVII, 162), seems certainly very full. It was, however, obviously given immediately after the Comparini had brought the suit to rescind the dowry contract, and long before the Processus Fugae; although it refers to "all lawsuits and causes, civil or mixed,"— omnes litas et causas civiles et mixtas, *motas et movendas* — yet the Processus Fugae was a criminal prosecution. From the earnestness with which Archangeli presses the point, it is highly probable that after Pompilia's elopement, Guido gave another power to Paolo to enable him to recover the stolen property. [4] qualitas personae; perhaps better, the qualifying circumstance of rank or social condition. [5] error individui.

Section 61.

[Spreti, Pam. 9, cxxxiii, 139, § Tanto magis quod.]

This is so much more in point in that[1] the said Guido was criticized by the Procurator of Charity himself,[2] who defended the said Francesca Pompilia and Canon Caponsacchi, in his printed argument,[3] § Horreret quidem animus, for bringing this kind of a prosecution before a Judge, for those reasons that are noticed by Castrens. cons. 277, sub n. 3 toward the end, vers. Sed nec Judices, lib. 2; Menoch. de Arbitr. cas. 398, n. 26; Nevizan. Silv. Nuptial. lib. 1, vers. Non est nubendum, n. 34 and n. 89; Soccin. Jun. cons. 34, n. 9, lib. 2; Novar. in Summ. Bullar. Comment. 72, sub n. 81, vers. Unde merito; many of whom we have also cited, in our previous argument, § Et haec nostra.[4] For the aforesaid authorities unanimously assert that husbands are reputed to be baseborn and horned, if they do not take vengeance with their own hands, but wait for that to be done by the Judges who laugh and roar immoderately; whence it is not wonderful if the luckless husband even after having had his said recourse to the Judge, which then the hasty zeal of his anger suggested to

him, wished to avenge himself for his lost honor. For he committed crime in order to escape the censure of the vulgar and of the learned, and that he might not add this infamy also to the loss of his honor.

[1] Tanto magis quod. [2] Lamparelli. Mr. Hodell translates, "Procurator of the Poor," who was Archangeli. [3] in sua allegatione impressa; unfortunately this has not been preserved for us, although it was printed. See Lamparelli's argument, § Modo autem, CCXLIII, 241, Ch. XII, sec. 2. [4] in nostra praeterita informatione; allegatio and informatio are equivalent terms. "Our past argument" refers to the first stage of the case before the decree for torture. § Et haec nostra, XXXI, 32, ante sec. 25.

AUTHORITIES

Castrensis, cons. 277, n. 3: "They are reputed to be baseborn and horned who do not avenge themselves for such things with their own hands, but wait to be avenged by a Judge. But not even the Judges are wont to administer the law in such matters, but to mock them, and roar and laugh at them, whence the husband has a just excuse if he does not have recourse to the Judge, but repels the wrong by his own authority." Menochius and the other authorities are to the same effect. Nevizanus says that nowadays adultery is not punished by law, in France one never hears of legal punishment, nor in Germany. Socinus Junior says that in his day the right to kill is freely extended to husbands, by which alone the crime is restrained.

SECTION 62.

[ARCH., PAM. 1, XVI, 17, § QUAE BENIGNIOR.]

And this milder opinion is the more readily to be embraced, as I suppose,[1] because the deed[2] about which we argue, does not, even according to the views of the Fisc,[3] carry with it attendant circumstances[4] indicating[5] such a rigorous penalty; certainly the taking of associates who were employed in the homicides is not such a circumstance, because Guido could lawfully use the help of companions in order that he might more safely provide for his own honor by the death of his wife; Castren. cons. 277, lib. 2: Soccin. Jun. cons. 34, n. 12, lib. 2;

Paris. cons. 154, n. 7 and 8, vers. Quinimo, and n. 16, lib. 4; Caepoll. cons. crim. 4, sub n. 13; and by others without number; Caball. cas. 300, n. 59.

[1] authumo for autumo. [2] Perhaps factum is used, like fact in Elizabethan English, in the sense of an evil deed. [3] juxta sensum Fisc. [4] circumstantias; nearly equivalent to qualitates. These attendant circumstances, however, are distinct from the aggravating circumstance of unlawful assembly, prohibited by statute, etc., which forms a distinct subject, discussed in Ch. IX. [5] praeseferentes.

AUTHORITIES

Paulus Castrensis, cons. 277, n. 3, cited ante in § Et facit etiam, CXXXIII, 139, ante sec. 56, where the husband was aided by his brothers and brothers-in-law whom he provided with clubs "because he doubted whether the seducer might not come with companions armed or unarmed, so that he might not be able to withstand him empty-handed without peril." Socinus Junior, book 2, cons. 34, n. 12, and Caepolla, cons. crim. 4, n. 13, sustain the text. Parisius, cons. 154, n. 16, says that the husband may assemble his friends and relatives to be present at the homicide, but not to accomplish it, although they are not punishable if they do not prevent it. Caballus, cas. 300, n. 59, cites many authorities saying "where something is permitted to be done, everything is likewise permitted without which the first cannot readily be accomplished."

Many of the authorities cited in this branch of the argument are repeated in the Argument pro Sociis, § Quae dicta sunt, XXXVI, 35, Ch. XI, sec. 1 et seq.

SECTION 63.

[SPRETI, PAM. 2, XXXII, 32, § PRAEDICTIS NULLATENUS.]

It would in no respect be any objection to what has been said if, without prejudice to the truth, we should admit (as the Fisc alleges) that the said Guido had killed his wife with the complicity and assistance of the aforesaid Blasio, Domenico, Francesco, and Alessandro, assembled for that purpose, because it was lawful for him to do this in order that he might take vengeance upon her more conveniently and safely; Bald. in cap. ultim. n. 6,

about the end, de Juram. Calumniae [Decret. 2, 7, 7]; Castrens. in leg. Refectionis n. 4, Cod. [ff.] Comm. Praedior. [Dig. 8, 4, 11]; Jas. in leg. 1, § Usufructuarius, n. 5, vers. Secundo notabiliter limita. ff. de oper. nov. nunciat. [Dig. 39, 1, 20]; Castrens. cons. 277, n. 3, lib. 2; Caepoll. cons. crim. 4, n. 13, vers. Secundo similiter and n. 14 and 15, where he reports that this had been decided by the whole Court of Verona, and n. 16 et seq., where he says that this is the truth; and in cons. 73, n. 11; and de Servit. Urban. Praedior. cap. 23, n. 11, where he likewise says that it has been so adjudged, and that it should be held in mind. Rolan. cons. 34, n. 8 et seq., as far as 18, lib. 2; Soccin. Jun. cons. 34, n. 12 et seq., vol. 2; Paris. cons. 154, n. 7, vol. 4; Jo. Franc. de Pont. cons. 98, n. 31 et seq., lib. 1, which is also repeated at the end[1] of said decision of Sanfelicius 337, n. 89 et seq.; Marsil. singular. 175 throughout; Cassan. ad Consuet. Burg. Rub. 5, § 1, Tit. des Rentes, n. 43, page in my book 815; Nevizan. Silv. Nuptial. lib. 1, vers. Non est nubendum n. 98; Gomez. ad leg. Tauri 80, n. 62; Caball. resol. criminal. cas. 300, n. 58, with the following sections and n. 75; Marta Vot. seu decis. 206, n. 9; Garz. decis. 71 throughout.[2]

[1] in Calce. This consilium of Joannes Franciscus de Ponte is similarly cited in § Nec verum est, XXVI, 28, ante sec. 12; § Suppetit quoque, XXIX, 30, ante sec. 39; § A qua quidem, CXXXI, 138, ante sec. 53. [2] This section of Spreti's argument is referred to by Bottini, § Dixi nil, CLXIV, 172, post sec. 82.

AUTHORITIES

Many of these authorities are also cited by Archangeli in the preceding Section, § Quae benignior, XVI, 17. Caepolla de Servitutibus, ch. 23, n. 11; Rolandus, cons. 34, n. 8, book 2; Nevizanus, Non est nubendum, n. 98, support the text and cite the authorities. Caepolla, cons. crim. 4, n. 15, refers to a Statute of Verona, also cited by De Marsiliis, Singularia 175, under which the right was given to a brother, and in terms only to him, to kill a sister so offending. The brother,

having found a man with his sister in her bedroom, killed him with the assistance of a friend. It was held that the defendant was justified. Cited also, § Quae dicta sunt, XXXVI, 35, Ch. XI, sec. 1.

Chasseneus Consuet. Burg. V. Des Rentes, § 1, n. 43, says the point occasioned much dispute among the Milanese doctors. The husband in one case called a servant to his aid, who killed the adulterer; both escaped punishment. See § Quae dicta sunt. Gomezius ad leg. Tauri 80, n. 62, after denying the right of a husband to delegate his privilege, says, "There is one thing, however, that a husband can do in such a case, viz., assemble his friends or servants that they may help him and that he may take vengeance more readily and safely, and especially if he is old, infirm or weak, and fears lest he may encounter resistance."

Antonius Gomezius, Professor at Salamanca, was rated as the Prince of Spanish criminalists of the 16th century. His treatise ad Leges Tauri is a commentary on the laws promulgated in 1505 by the Cortes of Toro, an account of which may be found in General Survey by European authors, Continental Legal History Series, pp. 632, 634. It was considered in Spain as the vade mecum of lawyers and judges.

Bartholomaeus Chassaneus or Barthémy Chasseneux, 1480-1531, president of the Parlement of Provence, was a distinguished lawyer and judge. He was the author of the often cited commentary on the Consuetudines Ducatus Burgundiae, and of the Catalogus Gloriae Mundi, a celebrated book, in which, according to Tiraquellus, the author plagiarized extensively from the latter's Tractatus de Legibus Connubialibus. Chassaneus was appointed advocate for the rats in the prosecution brought against them. See E. P. Evans, Criminal Prosecution and Capital Punishment of Animals, p. 18 et seq.; Murray's Lawyers' Merriments, p. 128.

Section 64.

[Arch., Pam. 1, xvi, 17, § Neque delictum.]

Nor is the crime raised to a higher grade because[1] he hired[2] his associates for a stipulated price, since a husband has a legal right — which is more, and beyond comparison more remarkable — to delegate[3] to others the killing of his adulterous wife, even by means of money,[4] as is firmly held by Bald. in l. Gracchus n. 5, C. ad l. Jul. de Adulter.; Afflict. in Constit. Regni lib. 1, rubr. 8, de cultu Pacis n. 8 [30]; Mazzol. cons. 57, n. 18; Carer. Pract. crim., § Circa itaque n. 5, sub vers. Ad instar hostis, vers. Tamen Baldus, page in my book 192, and § Excusatur n. 13, vers. In tanta, page in my

book 196; Alex. Rauden. var. resol. cap. 7, n. 5, vers. Et mediante assassinio; Paschal. de Patr. Potest. lib. 1, cap. 5, n. 23, vers. Qui dicit hanc vindictam; Viv. decis. 197, n. 25, lib. 1; Mart. vot. Pisan. 206, n. 9; Gramm. super constit. Regn. si maritus n. 12, lib. 3; Caepoll. cons. crim. 73, n. 11 [10], vers. Sed hoc respondendum; Calvin. de aequitate lib. 1, capit. 58, n. 30.

[1] ex quo. [2] socios conduxit; Mr. Hodell translates: "led with him." That point was disposed of in § Quae benignior, ante sec. 62. [3] demandare; Mr. Hodell translates: "demand of." It means to give in hand, charge, delegate or commit to another, etc. [4] mediante pecunia; see Glossary.

AUTHORITIES

Mazzolus, cons. 57, n. 18, is not important. Paschalis de Viribus, P. 1, ch. 5, n. 23, quotes this opinion of de Afflictis that this vengeance in a case permitted by law may lawfully be taken even by assassination and by means of money, following Baldus. Marta vot. 206, n. 9, also supports the text as do Vivius, and Calvinus, who says this is the common conclusion. Caepolla, cons. crim. 73, n. 10; a case of homicide, where the defendant made use of associates. This he could do, because when a thing is permitted by law to be done, all is conceded without which that which is granted cannot be performed.

The arrangement of Carerius's Praxis is most confusing. The references here are better made as follows, from my edition of 1548, § Circa Itaque, n. 5, etc., is § Circa quartum, n. 198, page 134, "Tamen Baldus tenet in l. Gracchus, etiam per pecuniam posse occidere." § Excusatur, n. 13, vers. In tanta, is probably § Circa quartum, n. 240, page 138, vers. Sed an stante. See other references to Carerius, § Nec verum, vers. Afflict., XXVII, 28, ante, sec. 13, and § Et quidem, XXXIII, 32, post sec. 65, next section. Many of these authorities also in § Et in fortioribus, XXXVIII, 36, Ch. XI, sec. 13.

SECTION 65.

[SPRETI, PAM. 2, XXXIII, 32, § ET QUIDEM ETIAM.]

[Nor would it be any objection, even if we should admit] also that Guido had hired[1] the aforesaid men by means of money.[2] Bald. in l. Gracchus sub. n. 5; Afflict. super Constit. Regni lib. 1, rubric 8, n. 30, and lib. 3, rubric 46, n. 3 and 4, in

each of which he testifies that he had seen this in practice;[3] Carer. practic. criminal. in 3 tract. de homicid. et assassin., § 8, Excusatur pater n. 13, fol. 169 [196?], and § 9, Excusatur maritus n. 11, fol. 170 reverse; Marta in said vot. seu decis. 206 in said n. 9, with others cited below in § Et in fortioribus [XXXVIII, 36, Ch. XI, sec. 13].

[1] conduxisset; Mr. Hodell translates, "assembled." [2] mediante pecunia. [3] Se ita practicari vidisse.

AUTHORITIES

Spreti practically repeats some of Archangeli's authorities in § Neque delictum, XVI, 17, the preceding section. The reference to Carerius is § Circa quartum, n. 234, Octavo excusatur pater, page 136 (reverse). See § Neque delictum, XVI, 17, sec. 64, § Quae dicta, XXXVI, 35, Ch. XI, sec. 1; de Afflictis in the passage cited does not go as far as the text states.

SECTION 66.

[ARCH., PAM. 1, XXII, 22, § HAEC SANE.]

These defenses would doubtless hold good even if[1] the accused had confessed the aforesaid [homicides], or had been legally convicted of them, neither of which can be affirmed; much more therefore are they to be allowed since Guido confesses that he merely gave orders to cut his wife's face[2] or to disfigure it,[3] and if his mandataries went beyond his commands he should certainly not be held responsible for the excess. Decian. tract. crim. lib. 9, cap. 36, n. 6, vers. Et ego unum defendi; Clar., § Fin. qu. 89, n. 5; Menoch. de Arbitrar. cas. 352, n. 3; Farinac. qu. 135, n. 156.

[1] quoties; see Glossary. [2] dedisse ordinem ad incidendam faciem uxoris; Mr. Hodell translates: "gave order for striking his wife's face." [3] ad sfrisiandum; Cf. § Si igitur, XXXV, 34, Ch. V, sec. 1; Ch. VIII, sec. 67. See Glossary as to this word. A jealous husband, or a disappointed suitor, or a man whose mistress betrayed him, would frequently employ this very effectual method of revenge, whereby the woman was forever made unattractive to other

men. Instances abound in the old law books, and a modern one is sometimes observed, as in the case of the disfigurement of an Italian girl by her discarded lover, the weapon being a razor, in the Philadelphia Evening Telegraph, May 28, 1915. See on this subject Westermarck's History of Human Marriage p. 122, and Comedy of Errors, V, i, 183, with Furness's note on Macbeth III, ii, 18. Antipholus of Ephesus threatened to scorch (scotch) or disfigure his wife's face by cutting it.

AUTHORITIES

Decianus, book 9, ch. 36, n. 6, says: "And I once defended a man who had given orders to disfigure the face of a prostitute (in ordinary speech we call it sfrisare) with a little knife, made with an edge for sharpening pens; — and yet I do not know whether he (the mandatary) killed the woman by design or chance, because he thrust the knife into her throat — for I argued that this instrument, if it had been used by the edge, and not by the point, would not have been apt to cause death. And so he was relieved from the ordinary penalty and put under ban for three years; and for this reason also he should not be condemned to death who had commanded this woman's face to be marked and disfigured."

Clarus, book 5, § Fin. qu. 89, n. 5: "I would also make the same reply (i.e., that an extraordinary punishment be inflicted) if the command had been given to disfigure, for it would appear that he ordered something to be done which naturally is not followed by death, especially where the disfigurement is to be made on the face with the edge of a knife, by which no one is ordinarily wounded to the death."

Menochius de Arbit. cas. 352, n. 3: "As suppose I have ordered you to disfigure a prostitute (as it is generally called sfrisares) but you wound her very severely in the face with a sword, by which death results, I am not held by the ordinary penalty as if I had commanded you to wound her, since the mandatary need not have exceeded the limits of the mandate." Farinacius, qu. 135, n. 156, is to the same effect.

Observe that this argument was made in the first stage of the trial before the order was made for the administration of the Vigil, which resulted in the fuller confession that the homicides were intentional and commanded. It is the character of the employment when an act is done, not the private instructions to the servant, by which the master's liability is to be determined, at least in civil actions, McClung vs. Dearborne, 134, Pa. St. 396.

Tiberius Decianus of Udine (b. 1508, d. 1581), was one of the recognized criminalists of his time, and an eminent authority. Renazzi says of him, "vir certe dignus meliori saeculo." The strictures of Von Bar on the Tractatus Criminalis appear unmerited.

Julius Clarus was born in Alexandria, Milan, in 1525, and died in 1575. He was Praetor at Cremona, and Judge of the Supreme Court of Milan, and one of the most famous authorities, especially in criminal law. See Esmein, History of Continental Legal Procedure, p. 292, and

Nypels, Bibliothéque § 234. Clarus projected seven books, but only those De Testamentis and De Maleficiis are complete. He is cited some fifteen times in the O. Y. B.

Section 67.

[Spreti, Pam. 2, xxxv, 34, § Si igitur D. Guido.]

If therefore Count Guido (even assuming[1] that he had confessed that he with the complicity and aid of the aforesaid, had killed his own wife, his father-in-law and his mother-in-law) should not, in accordance with what has been said, be punished with the ordinary penalty; much more readily should we arrive at this conclusion by observing[2] that he merely confessed that (to use the words of the authorities) he had given a mandate only for disfiguring[3] his said wife, for in this case he is not himself responsible for the resulting death of his said wife and of the others; Dec. cons. 622, n. 4, where it is said that he who gives the mandate in such a case can only be punished according to the degree of negligence[4] for which [negligence] not even corporal punishment can be inflicted; Grammatic. cons. 20, n. 1 and 2; Vermigl. cons. 16 throughout, especially n. 20; Petr. a Plaz. Epitom. delictor. lib. 1, cap. 15, n. 1, vers. Idem etiam dicendum si fieret mandatum ad sfrisandum; Menoch. de Arbitr. cas. 352, n. 3 and 4; Farinac. qu. 135, n. 156.

[1] quatenus; often so used in the O. Y. B. [2] attento; see Glossary.
[3] ad sfrisiandum. [4] per modum culpae.

This section is repeated in the argument as to torture, Ch. V, sec. 1.

Authorities

Decius (not Decianus as Mr. Hodell expands the abbreviation Dec.), cons. 622, maintains the proposition that he who commands his servant to wound another where death results, is not liable for the homicide. The command did not include homicide, and the servant "excessit modum" because he inflicted such a severe wound that the man died.

"And for that excess and for the said resulting homicide beyond the intention of the mandant, the mandant should not be punished with corporal punishment, but only pro culpa."

Menochius and Farinacius have been previously cited by Archangeli on this point in the preceding section, § Haec sane procederent. Vermigliolus, cons. 16, says that he who gives a mandate ad sfrisiandum cannot be inferred to have given a mandate to kill, although death result. So Grammaticus, cons. 20, n. 1 and 2, holds that if a mandate be given to beat some one, the mandant is liable for death if it occur although he commanded not to kill. But if the mandate is to use his fist or a stick, and the mandatary uses iron, the mandant is not liable for death resulting; the question depending upon the nature of the instrument used.

Petrus a Plaza, Epitome Delictorum. I cannot find the passage cited, Idem etiam (The same thing should also be said if the mandate had been given for disfiguring) but this Doctor gives other instances of the application of the principle.

The doctrine as developed became very technical in its distinctions.

Section 68.

[Arch., Pam. 1, xxii, 22, § Socii et comites.]

[It may be said on the other side that] his associates and companions accuse him by name[1] and declare that he took part in the murders,[2] but — besides that the Fisc [itself] alleges that they have concealed the truth in very many instances [and] equity does not permit that they can be divided[3] in their deposition and only accepted in part, since he who is false in one thing, is considered such in all — [besides this] it would be more than sufficient[4] to take away all credibility from them that they have not purged their stain [of infamy] under torture in his presence. Scacc. de Judic. lib. 1, cap. 86, n. 56; Farinac. qu. 43, n. 34 et seq.; Cartar. Pract. Interrog. Reor. lib. 4, cap. 1 [2], n. 14; Honded. cons. 100, n. 2 and 16, lib. 1; Caball. Resol. crim. cas. 85 [84], n. 11.[5]

[1] illum nominant, a technical term; Mr. Hodell translates, "give his name." See Chartarius Interrog. Reorum, Book 4, ch. 2,

n. 14. [2] caedibus; Guido's lawyers generally use "homicidium." [3] that is, that their depositions may be divided. [4] exhuberaret. [5] In the first stage of the trial, Guido confessed only that he gave orders to disfigure Pompilia; he did not confess the homicide. Archangeli here answers what might be argued on the other side, that Guido was implicated by the confession of the accomplices, by showing first, that this use of their confessions by the Fisc was inconsistent with the claim that the accomplices had concealed the truth in other matters; but further, as a matter of law, the accomplices by their own confession were stained with infamy, so that their accusation of Guido could not be received as is shown by the authorities cited. See also Martinus, Praxis Criminalis, 204 et seq., who gives the formulae.

AUTHORITIES

Farinacius, qu. 43, n. 34, says that the deposition of an associate in a crime does not make the preliminary proof for torture against another because by his own confession he is rendered infamous, even although two or more are deposing against the same person. And in qu. 43, n. 134, he says this incrimination must be ratified freely and without torture, and then ratified under torture specially administered in order to purge the defect of infamy, face to face with the person named (ad faciem nominati). Caballus cas. 84, n. 11, is to the same effect. The socii by their own crime have become infamous and cannot be admitted as witnesses without torture. Hondedeus, book 1, cons. 100, n. 2 and 16, is to the same effect. Scaccia de Judiciis, book 1, ch. 86, n. 56, says that the accusation of an associate in the crime is insufficient even if made under torture. It must be repeated under torture and in confrontation.

See also § Praeterea D. Guido, CXXI, 128, Ch. X, sec. 20.

SECTION 69.

[ARCH., PAM. 1, XXIII, 23, § LICUIT AD DEFENSAM.]

It has been my privilege to prepare this argument in defense of this nobleman[1] currenti calamo as they say, on account of the scantiness of the time, which has not allowed me to accumulate other grounds of argument which could be collected with little labor, and perhaps not without advantage, although I may believe that the objections which can be raised on the side of the Fisc have been more than sufficiently answered.[2]

[1] iustius nobilis viri; probably a misprint for istius. Mr. Hodell translates, "It has very justly been permitted that," etc. [2] exhuberanter satisfactum esse objectionibus.

This section is Archangeli's conclusion to his first or preliminary argument.

Section 70.

[Spreti, Pam. 16, ccxxxii, 234, § Denique respectu.]

Finally, with respect to Count Guido, I pray you to bear in mind his unfortunate condition, and that of his noble family; for all of this family and his relations have had enough to lament, and even to the last breath of their lives, when they look back upon the disgrace brought upon them by this woman and her parents; and because of this disgrace it is at present doubtful whether one who is even more nearly related will not have gone mad.[1] The distinguished compassion of my most merciful Sovereign and most illustrious Lord assuredly dictates this consideration, to whom the accused with his whole heart has commended himself in his confessions,[2] not to mention that[3] they may learn the same thing from the anonymous author annexed to Sanfelic. decis. 337 at the end.[4]

[1] proximior, comparative of proximus. According to Harper's Lat. Dict. found in Ulpianus apud Priscianum, si quis proximior cognatus nasceretur. Mr. Hodell translates: "one nearly related would go mad," but Guido himself is meant, he being nearer to himself than the nearest relative; compare the quotation below from Sanfelicius. [2] in suis constitutis; see Glossary. Mr. Hodell translates: "in the arguments made in his defense." [3] absque eo quod, generally in the O. Y. B. in the sense of notwithstanding. [4] hoc idem discant ab auctore anonym. subtus Sanfelic. dec. 337, in fine. Mr. Hodell translates: "not to speak of what they may learn about it from the Anonymous Author [Pamphlet 10]." But the reference is to the argument of an anonymous counsel included in or annexed to the often cited decision in Sanfelicius, number 337; "Subtus" in this sense is frequently found in the O. Y. B. In this decision the question was whether and when a husband should be punished

who kills his wife from a suspicion of adultery, not in the act, but after an interval. Sanfelicius includes the arguments of three Doctors, in behalf of the accused, and as their names are not given, they are "anonymi," and so referred to in the O. Y. B. The third and last argument is the one intended in the text, when in n. 100, the counsel closes with an appeal to the Judges; the case as he says "should move the Lords Judges to the greatest compassion * * if there is any room in it for an extraordinary punishment the Judges should use their discretion * * considering the rank, and the unfortunate position of the Count, who justly doubted concerning his wife. How much weight they should have and what effect is thereby produced upon persons of such rank should be most carefully considered by the Judges, and it may appear extraordinary if he shall not go mad; and since the Count has borne, now bears, and will bear to the last breath of life the penalty of the everlasting torture of his mind, these things should not appear trifling to careful Judges in the case of a person of such condition, and so all other judicial penalties should cease." Clearly, Spreti based this section of his argument on this decision of Sanfelicius.

Section 71.

[Arch., Pam. 8, cxxii, 130, § Caeterum enixe.]

In conclusion,[1] I earnestly beg that my most Illustrious Lord will be pleased to consider[2] with kindly countenance and tranquil vision, that Count Guido killed in order that his honor, which had been buried in infamy, might rise again. He killed his wife, because she had been his shame, and her parents, because they had laid aside all sense of decency[3] and repudiated their daughter, and had not blushed to declare that she was a harlot's child, in order that he might be disgraced; those parents who had perverted their daughter's mind, and not merely allured her to unlawful amours, but even compelled her to them by the strength of her filial obedience.[4] He killed, that forsooth he should live no longer in disgrace, detested by his relatives, branded by the nobility, forsaken by his friends, ridiculed by every one. He killed them in this

City of Rome assuredly! which in other days had beheld a noble matron wash away the stains of her violated modesty with her own blood, — the stains which a king's son had thrown upon her, against her struggling will, thus expiating by her own death another's crime and violence[5] (Valerius Maxim. lib. 6, cap. 1, n. 1; Tit. Liv. lib. 1 Histor.); — in this City of Rome, which also saw a father go entirely unpunished, and even bepraised, who stained his hands in his daughter's blood, so that she should not be ravished[6] (Valer. Maxim. supra n. 2; Tit. Liv. lib. 3 Histor.); so heavily did the dread of losing his honor lie upon his heart, that this father preferred to be deprived of his daughter, rather than that she should continue to live in dishonor, although against her will. Count Guido killed them in their own home so that the adulteress and her parents, who were partakers of her crime, might acknowledge that no place and no refuge was safe and impregnable to injured honor, that these scandals should not continue there without interruption, and that the home which was witness of their shame, should also be the witness of their punishment. He killed them because in no other way could his reputation, so outrageously wounded, heal its scars.[7] He killed them that he might furnish an example to wives that the sacred obligations of marriage should be religiously observed. In a word, he killed them that, so far as he was able,[8] he might live as an honorable man, but if not, that he might fall the pitiable victim of his own offended honor.

[1] caeterum. [2] perpendere; again Browning's perpend. [3] Verecundia; Mr. Hodell translates, "truthfulness." [4] obedientiae. [5] referring to the story of Lucretia, in the Memorabilia. [6] referring to Virginius and his daughter. [7] ducere cicatrices. [8] pro posse.

ARGUMENT FOR THE FISC

The detection must be in the act, and the vengeance immediate, in order that the penalty for homicide should be mitigated.

I

IN GENERAL

A. To moderate the punishment of a husband who kills his adulterous wife, he must have detected her in the act of adultery, and killed or mortally wounded her at the time.

1. This is the opinion of most authorities. Section 72

2. Those on the contrary side do not apply where, as in this case, the crime is accompanied with aggravating circumstances. 74

B. The texts that authorize a father to kill his adulterous daughter (or son who has dishonored him) provide that the detection shall be in the act, and the reason is stronger in the case of a husband killing his adulterous wife. 77

AND IN PARTICULAR

II

DETECTION IN THE ACT IS ESSENTIAL

A. Preparatory acts are not sufficient in criminal cases. 80

B. Nor is mere suspicion, however strong. 81

c. And subsequent proof is not equivalent to detection in the act itself. Farinacius and Raynaldus are of this opinion. Section 84

III

VENGEANCE SHOULD BE IMMEDIATE

a. It is essential that the injury be avenged immediately, and not after an interval; Guido therefore lost his right when he had recourse to the law, thus electing public instead of private vengeance. 87

b. Physical inability to take vengeance at the time does not justify vengeance after an interval. It was Guido's own fault if he was insufficiently armed.

c. In fact, the circumstances show that the reason for Guido's delay was his desire to secure the dowry, rather than to avenge himself. 91

Section 72.

[Gambi, Pam. 5, lxiii, 67, § Hinc cum haec.]

Hence,[1] when this cause is now to be presented to receive its decision,[2] we believe that no substantial[3] defense can be brought forward in behalf of these criminals, to escape the extreme penalty of death so far as they have confessed the crime, or to exempt those who have denied it[4] from the rigorous torture of the Vigil. For although[5] the question may be vigorously discussed by counsel for the defense whether a husband should be excused from the ordinary penalty of the Lex Cornelia de Sicariis, who kills his adulterous wife, not immediately and when she is detected in the act,

but after an interval; (since some authorities profess the affirmative[6] opinion in favor of excusing the husband, as may be seen in Giurb. cons. 86; Gizzarel. dec. 18; Muta dec. Siciliae 61; Bertazzol. cons. crim. 206 and cons. 356; Sanfelic. dec. 537 [337]; Pratus ad Paschal. de patr. potest. par. 3, c. 6, vers. Hinc; Caball. resol. crim. cas. 300; all of which authorities are moved by this reason for mitigating the penalty for a husband who kills his wife after an interval, viz.: that since the causa honoris continually oppresses the heart, it is difficult to restrain just resentment, by reason of which the defense of honor is said to be made "immediately" when it can be executed at an opportune time[7]) —

[1] The preceding sections of Gambi's argument detail the facts of the case. [2] pro resolutione capienda. [3] nullam subsistentem defensionem. [4] negativos. [5] licet enim; here Gambi refers to the authorities cited on the other side, in the next section to those that support the Fisc. Licet enim is correlative with Alii vero. [6] affirmativam. [7] commode; conveniently in respect to time. Mr. Hodell translates, "as quickly as possible."

AUTHORITIES

The authorities here are among those cited by Archangeli and Spreti in their arguments, § Magnum quidem, x, 12, ante sec. 1; § Et ita conciliando, XXV, ante, sec. 4, and other sections.

SECTION 73.

[GAMBI, PAM. 5, LXIII, 67, § ALII VERO.]

But very many other authorities certainly defend the negative[1] opinion, viz.: that a husband who kills his wife, otherwise than when detected in adultery and in the very act, should be punished with the ordinary penalty. It is so held by Angel. de Malefic., verbo Che hai adulterato la mia Donna, n. 1, vers. Multo minus; Clar. in § homicidium, n. 48 and § Fin. qu. 89 at the end; Gomez. ad leg. Tauri 80, n. 68; Covar. in Epit. Jur. Canon. 2 part,

cap. 7, § 7, n. 3; Farinac. qu. 121, n. 111 et seq., and in cons. 141 throughout, where he replies to the contrary authorities; and D. Raynald. cap. 2, § 4, n. 155, and cap. 7, in Rubr. n. 118 et seq., where he says that this is the truer opinion and more advantageous to the Republic, and that one should not depart from it in giving judgment; Sanz. de Regim. Valentiae, cap. 8, § 8, n. 63 and 64, where he says that it has very often been decided by that Senate [of Valentia] that a husband is not excused by reason of adultery legally[2] proved, if he kills his wife after an interval, for this reason, that of old, according to the law of Romulus, the husband had the right to kill his wife, but the Lex Julia permitted him only to kill a baseborn adulterer, as is approved by Anton. Matthaeus de criminibus tit. 3, de adulter. cap. 3, n. 13.

[1] negativam. [2] legitime probato.

AUTHORITIES

These are the principal authorities that favor the Fisc on this point. Farinacius, qu. 121, and Raynaldus, are referred to by Archangeli in Pam. 1, § Quibus praehabitis, XI, 13, ante sec. 10, and are abstracted in the notes.

The discussion of the subject by Antonius Matthaeus is important. Westermarck, Origin etc., of the Moral Ideas 1, 294, says "to declare that an adulterer or adulteress caught in flagrancy, or a manifest thief, may be slain with impunity, is a concession to human passions, which are naturally more easily aroused by the sight of an act than the mere knowledge of its commission. It was for a similar reason that the Law of the Twelve Tables punished *furtum manifestum* much more heavily than *furtum nec manifestum*."

SECTION 74.

[GAMBI, PAM. 5, LXIV, 68, § ATTAMEN IN HAC; AND § QUIA DOCTORES.]

But for all that, we believe that in the facts of this case of ours[1] we are concerned with something not involved in the difficulty of the question above presented;[2] because the authorities above

cited in support of the contrary opinion, apply, and ought to be so understood, in cases whenever the question concerns a husband who kills his wife without exceeding his legal right[3] and with no concurrent circumstances, and aggravating conditions,[4] and moved only by his just resentment. But it is otherwise, when, as in our case, there are present a transgression of legal right and a contempt for the law,[5] and besides aggravating circumstances and conditions concur. That we should proceed, according to the common practice, with this distinction, is affirmed by Laurent. Matthaeu de re crim. contr. 12, n. 29. After he has declared that a husband is to be excused from the ordinary penalty and punished more mildly, he adds: "From these authorities the common practice is that the effect of the resentment should be considered, and only the excess punished, so that if there is a suspicion of craft in the manner of killing, as for example[6] a circumstance tending to show treachery, the punishment is increased."[7]

[1] in hac nostra facti specie. [2] extra difficultatem propositae quaestionis. [3] absque excessu legis. [4] qualitatibus aggravantibus. [5] excessus et contemptus legis. [6] ut puta; the ordinary expression. Mr. Hodell translates: "as he considers any circumstance which tends toward treachery." [7] This section is repeated in the argument as to the aggravating circumstances, Ch. X, sec. 42.

AUTHORITIES

Matthaeu et Sanz contr. 12, is the case of Francesco Palomeque translated in appendix.

SECTION 75.

[BOTTINI, PAM. 6, LXXVI, 83, § CAETERUM QUATENUS.]

Besides, assuming that[1] the accused might also have conceived some suspicion of his wife's infidelity that could have[2] provoked his just anger,

both from the said elopement of his wife, and from the letters which were found, as is alleged, — and their verbal sense seems to present that of a lover, yet by no means does this render excusable[3] such ferocious vengeance taken after so long an interval of time and that not merely upon his most wretched wife herself, but upon her parents, who were entirely off their guard, and deserved no such fate, and with such weighty attendant circumstances, increasing the grade of crime, so that he would have to be punished with the extreme penalty,[4] if that defense should be admitted. For although just resentment because of the violation of conjugal fidelity[5] usually moderates the punishment for a husband[6] who kills his adulterous wife, [yet it is not so here] for the argument cannot any longer be made for total[7] immunity after the opportunity has been lost by the husband for vindicating his own honor by the death of the adulterer or adulteress, as is advised by Felin. in cap. Si vero [vere], n. 3 de sentent. excommunicat. [Decretal. V, 39, 34]; Imola in l. quid ergo, § si haeres, n. 4, ff. de legat.[7] [Digest 30, 53, 3]; Mantic. cons. 241, n. 18 at the end, lib. 1; Oldendorp. Var. lect. ad Jur. Civil. interpretat. lib. de usucap. tit. de adult. n. 1 at the end, page 295; Baccon. ad Trevul. vol. 2, disp. 32, thes. 6, Litt. C., vers. Idem conceditur, page 1277; Cassad. Rittesch. [Conradus Rittershusius] ad Novell. Justinian. par. 12, cap. 5, n. 8, page 677; Matthias. Stephan. ad Novell. [177, n. 36, etc.] page 609. But yet in order to escape or moderate the penalty of the Leg. Cornelia de Sicariis, all the requirements should be observed as is noted by Angel. de Malefic. vers. Che hai adulterato la mia Donna, n. 8 et seq.; and by Joann. de Teitops [Joannes Zeithopf] in

tract. de Jur. occiden. Praehens. in adult. part 2, n. 43 et seq.[8]

[1] quatenus; granting that, correlative with nullatenus, below. [2] provocare voluisset; velle as auxiliary. [3] excusabilis. [4] quominus poena ultimi supplicii plectendus non esset si illud fateretur. One of Bottini's peculiar sentences. Mr. Hodell translates: "that he would have to be punished with death even if he had not confessed the murders." But at this time Guido had not confessed the homicides, he claimed that his intention was only to disfigure Pompilia. Perhaps it means, if Guido *should* confess; but I think Bottini in referring to the defense of "suspicion" argues that even if this defense (illud) be admitted by the Fisc (fateretur being used passively), still the aggravating circumstances rendered Guido guilty of a capital crime. Quo minus non, is certainly unusual and apparently used for emphasis. The word non cannot qualify fateretur unless it is misplaced. [5] conjugalis fidei. [6] dolor maritum adulteram uxorem occidentem poenam temporare soleat. [7] totali; but Guido's counsel did not argue for total immunity. [8] This section is repeated in the argument as to the aggravating circumstances, Ch. X, sec. 43.

AUTHORITIES

The references to Oldendorpius, Rittershusius and Stephanus do not appear to be specially in point or important. Angelus de Maleficiis and the treatise of Zeithopf, however, are two of Bottini's chief authorities; see as to the latter, sec. 80 post.

SECTION 76.

[GAMBI, PAM. 12, CLIX, 165, § STRICTE IDEO.]

It therefore follows[1] that on the part of the Fisc it is only necessary to stand[2] strictly upon this, that it was not lawful for Guido Franceschini to kill his wife, who was not detected in adultery and in the very act, but after an interval, without incurring the ordinary penalty of the lex Cornelia de Sicariis, according as we have proved in our former argument, § Alii vero,[3] by the authority of many distinguished Doctors of the law, that a husband who kills his wife after an interval is not excused from the said penalty.[4]

[1] From the preceding section of Gambi's argument, § Ad quid, CLIX, 165, Ch. VII, sec. 12, where he claims that the guilt or innocence of Pompilia is immaterial in view of the other facts in the case. [2] insistendum venit. [3] LXIII, 67, ante sec. 73. [4] This section is repeated in the argument as to the aggravating circumstances, Ch. X, sec. 45.

SECTION 77.

[BOTTINI, PAM. 6, LXXVI, 83, § PRAECIPUUM AUTEM.]

But a particular and indispensable[1] requisite is that the wife be detected in adultery, in accordance with the Text in l. quod ait, 23 ff. ad leg. Jul. de adulter. [Dig. 48, 5, 24 (23)] where we read: "For the law intends[2] that the father shall thus possess the right only if he detects his daughter in the very act of adultery. Labeo also approves this, and Pomponius writes that she[3] be killed if detected in the very act itself. And this is what Solon and Draco say," as is explained[4] in the Gloss on vers. In ipsis rebus; and thus it is held by Bartolus and other commentators; Salicet. on l. Gracchus C. ad leg. Jul. de Adult. [Codex 9, 9, 4]; Angel. de Malefic. in said vers. Che hai adulterato la mia Donna, n. 8 and 9; Caball. resol. crim. cas. 300, n. 22, 29 and 33; Matth. Sanz de re crim. contr. 11, n. 12 et seq. And this Text, although it speaks of a father, holds good with much greater force in the case of a husband, whose anger can more readily be kindled against his wife by a perverse and often unjust suspicion conceived regarding her, and who is not always accustomed to form a wise decision in her behalf, which the law presumes that a father will do [for his daughter] by his natural instinct, as the Text advises in l. nihil interest ff. eodem [Dig. 48, 5, 33 (32)], which only excuses the father

if he kills his daughter together with the adulterer, or inflicts deadly[5] wounds upon her.

[1] indispensabile. [2] The preceding words of this quotation from the Text are "Quod ait lex 'in filia adulterum deprehenderit' non otiosum videtur;" that is, "that the law says (the father) shall have 'detected the adulterer with his daughter,' does not appear to be superfluous. For it intends etc.;" i.e. "it is the purpose of the law;" see Glossary, s.v. volo. [3] The text of the Digest, however, is, "in ipsis rebus Venereis *deprehensum* occidi;" Bottini has read it as "*deprehensam.*" The Gloss says that the adultery may be proved by an antecedent act. See on this whole section the Texts and Gloss as contained and translated in Appendix 2. [4] esplicat for explicat. [5] laetalia vulnera; Mr. Hodell translates, "unhesitatingly." The word is of course "letalia." According to the Digest, the wounds must be so severe that her life is preserved rather by fate than by the father's intention.

AUTHORITIES

The Gloss of Bartolus is not important. Caballus, cas. 300, n. 22, holds that the parties must be detected in actibus, and not ex intervallo, but that acta antecedentia are a sufficient excuse for the infliction of a milder punishment on account of the just resentment thereby aroused. Matthaeu et Sanz, contr. 11, is the case of Joannes Vecino in Appendix.

SECTION 78.

[BOTTINI, PAM. 14, CXCVI, 200, § NEQUE OBSTAT.]

Nor does the Gloss on the cited Text[1] in l. Divus Adrianus stand in the way, because it speaks of a son detected by his father in flagranti delicto with his stepmother, and not one killed by his father after an interval, as Farinacius holds after citing very many authorities in cons. 142 [141], n. 16, and the reason of the law is far different in the case of a father and in that of a husband killing after an interval, because as Farinacius adds on this point in n. 17, a father has the greatest power over his son, and by ancient law could even kill him; which right a husband certainly does not have [over his wife]. And besides the law more readily excuses a

father, because it is always presumed that he takes good counsel for his son from the instinct of paternal love but [the law does] not have this confidence in the case of a husband[2] because he is generally more ready to conceive an unjust suspicion of his wife, and therefore it should not be permitted that from mere suspicion he should have the power to kill her after an interval, nor should he be in any wise excused by reason of this suspicion, as after a consideration of the reason adduced by the Text in l. nec in ea, ff. ad leg. Jul. de adulter. [Dig. 48, 5, 23] — "because the devotion of paternal love generally takes good counsel for his children but the hot violence and impulse of a husband readily enraged, should be curbed"[3] — is held by Covarr. in tit. de Sponsal. et matrim. part 2, § 7, n. 2, vers. Licuit; Decian. [book 9] tract. crim. cap. 15, n. 38 at the end; Caball. resol. crimin. cas. 300, n. 21.

[1] Mr. Hodell translates, "the glossa in the alleged text." This is the well known decision of the Emperor Hadrian cited so often in these arguments, Dig. 48, 9, 5, de lege Pompeia de Parricidiis. See translation in Appendix. [2] quam confidentiam non habet de viro; Mr. Hodell translates, "one does not have the same confidence." [3] See the Text in Appendix. The quotation is not verbatim: "quod plerumque pietas paterni *nominis* consilium pro liberis capit; ceterum mariti calor et impetus facile *decernentis* fuit refrenandus."

AUTHORITIES

Decianus, book 9, cap. 15, n. 38, insists on this distinction between a father and a husband, as do the other authorities, which are not especially important.

SECTION 79.

[BOTTINI, PAM. 14, CXCVII, 201, § QUOD ADEO VERUM.]

And this is so true that a father is not excused unless his daughter herself is killed or at least mortally[1] wounded, together with the adulterer;

so that it should be attributed to fate rather than to paternal indulgence that she escaped death, and this [exception] has been introduced by legislators for no other reason than that such resentment as would provoke a father to inconsiderate anger is required in order to excuse him, so that he should not spare his own daughter. But since this statute is not enacted among the laws[2] that speak of a husband, a manifest inequality[3] is disclosed between the two, on account of the husband's excessive readiness to conceive suspicion and to fall into a rage against his wife.

[1] laethaliter; Mr. Hodell translates, "severely." [2] non legatur per leges; perhaps legatur from lego, 3rd conj. [3] disparitas.

Section 80.

[Bottini, Pam. 6, lxxvii, 84, § Idque est adeo.]

And this is so true that it is not enough if the wife be discovered in acts that are remote from or are [merely] preparatory[1] to the adultery, as the authorities generally affirm, and particularly Soccin. in cap. pervenit. n. 365, with the two sections following, de Sent. excom. [Decretals 5, 39, 17]; Blanc. de Judic. n. 69; Decian. tract. crim. lib. 9, cap. 5 [15], n. 15; Tolosan. sintasm. Jur. [Petrus Gregorius Tholosanus, Syntagma Juris Universi] lib. 36, cap. 6, n. 7; Laurent. Kirgheu. [Kirchovius] com. opin. cent. prima conclus. 5, vers. Adulter. an probaretur, about the middle; Anton. Matthaeus in Comment. de crimin. ad lib. 48, ff. tit. 3 [Cap. 3], n. 16, who maintains that Ulpianus[2] for the sake of modesty used only a few significant words which you can understand to mean nothing but the fifth degree of love;[3] Farinac. qu. 121, n. 42 about the middle, vers. Credo voluerit; Jo. Teitops

[Joannes Zeithopf][4] de Jur. occid. praehens in adulter. par. 2, n. 1, Litt. I; whose words I think it convenient to quote, since perhaps the Judges may not have him at hand. He thus explains the words of the said Text,[5] viz.: "Which undoubtedly show that acts preparatory to adultery are not enough here, but the impure membrorum commixtio is necessary;" and after citing the authorities he adds: "And this more clearly appears from the words of Solon quoted by Lucian in The Eunuch,[6] just before the end where it is said: 'Unless they lie who say that he was detected in adultery';" and then Zeithopf rejects the opinion of Accursius, who asserts that acts preparatory to adultery are sufficient, and in the section following[7] after stating his reconciliation of these views, viz., that the opinion of Accursius[8] ought to be understood of acts very immediately preparatory, he thus sets forth his own opinion [in the paragraph beginning] "Sed proximis vel [velut] in casu capit. Litteris 12 [X] de presumpt;" "But in those acts very immediately preparatory, as was the case in capit. Litteris 12 de praesumpt., where it is held that from the detection soli et nudi cum sola et nuda in eodem lecto jacentis, there arises a violent and certain suspicion of intercourse from which a decree of divorce may be granted. Nevertheless the laws cited under Letter I[9] show clearly that not even a violent suspicion is sufficient here; for this 'discovery'[10] is not[11] the true 'detection'[12] in the very act of adultery, and the argument that it constitutes full proof[13] of adultery in a criminal case is by no means to be strongly inferred from the civil case in the said cap. Litteris, since no one can be condemned on [mere] suspicions, much less put to death, l. absentem ff. de poenis[14] [Digest 48,

19, 5]. Nay more, the violent suspicion that is spoken of is not the certain evidence[15] for proof such as is required in criminal cases by l. final. C. de probationibus [Codex 4, 19, 25], but is on the contrary fallacious, because persons who are found in such wise might have so behaved in order that they might commit adultery, and nevertheless might not have been guilty, as Cravetta and others say."[16]

The translation of this section is particularly difficult, an examination of the authorities cited being necessary.
[1] praeparatoriis. [2] Ulpian's words in Dig. 48, 5, 24, are "Si in ipsa turpitudine filiam de adulterio deprehendat." [3] non nisi quintam amoris lineam; a reference to the hexameter verse: "Visus et alloquium, tactus, post oscula factum." See § Ex osculis, XI, 13, Ch. VI, sec. 19. Cf. Burton's Anatomy, Part 3, sec. 2, membr. 2, subsec. 4, and Horace, Od. I, 13, "Oscula quae Venus quinta parte sui nectaris imbuit;" the quintessence, or according to some scholars, the fifth part with which the Goddess endowed her favorites. The reference here is quite different. [4] Teitops; a misprint for Zeithopf. [5] Ulpian in Dig. 48, 5, 24, l. quod ait lex. Zeithopf also cites the words "in adulterio uxoris" in l. marito, Dig. 48, 5, 25 and l. mariti, Dig. 48, 5, 30. [6] By an apparent misprint, Mr. Hodell's translation is "Lucian, the Eunuch." This is reference to a passage in The Eunuch, one of Lucian's minor dialogues, generally omitted in the English translations, but to be found in William Tooke's edition, vol. 2, p. 376. For the quotation in the text see Schmid's Greek-Latin edition, vol. 4, p. 161:—*εἰ δὲ μὴ ψεύδονται οἱ περὶ αὐτοῦ λέγοντες, καὶ μοιχὸς ἑάλω ποτὲ, ὡς ὁ Ἄξων φησὶν, ἄρθρα ἐν ἄρθροις ἔχων.* Or in the Latin version: Si vero non mentiuntur, qui de isto narrant, etiam moechus aliquando deprehensus est, membra, quod ait tabula Solonis, in membris habens. *Ἄξων*, or axle, was used generally in the plural of the wooden tablets of the laws in Athens, which revolved on an axis, vertical or horizontal, to permit of easy reading, Plutarch, Solon 25. Tooke in his translation contents himself with referring to the letter of the law. The text of Plutarch, Solon 23, is simply, *Μοιχὸν μὲν γὰρ ἀνελεῖν τῷ λαβόντι δέδωκεν.* The object of this quotation from Lucian was simply to show what he understood by the words of Solon as quoted by Ulpian in the law quod ait lex. [7] in § secundo; either the following section, or the second section; the same thing as it happens here. [8] as expressed in the Gloss on the words "in ipsis rebus," l. quod ait lex. Dig. 48, 5, 24, see translation in appendix,

where Accursius quotes the hexameter in note 3 above. [9] the preceding part of Zeithopf's argument. [10] inventio. [11] By an apparent misprint, Mr. Hodell's translation omits the word "not." [12] deprehensio. [13] ad plenam probationem; the technical term. [14] the reference to the Digest beginning as usual with the first word "absentem" of the lex. Mr. Hodell translates "lege absentem," "in the absence of law." The text is, "Absentem in criminibus damnari non debere divus Trajanus Julio Frontoni rescripsit, sed nec de suspicionibus debere aliquem damnari divus Trajanus Adsidio Severo rescripsit." [15] indubitatum. [16] This quotation from Zeithopf beginning "Sed proximis" can be better understood by inserting here that which immediately precedes it, viz.: "And although the opinion of Accursius can appear to be made clear from Marianus Soccinus in his commentary on cap. pervenit., and Farinacius, in qu. 121, n. 42, so that it holds good not indeed in remote preliminaries, such as the discovery of a man and a woman in a chamber alone without any improper act; but in those acts very immediately preparatory," etc. (sed in proximis).

AUTHORITIES

Blancus de Judiciis, n. 69, is not important. Decianus Tract. crim. book 9, c. 15, n. 15, lays stress on the words of Pomponius l. Quod ait lex, Dig. 48, 5, 24, "in ipsis rebus." He says "licet oscula et tactus sint res Veneris, non sunt tamen ipsae res Veneris, nam relativum illud 'ipsis' habet emphasim et denotat rem perfectam, non coeptam, tamen," etc. As to the laws of Solon, see Pardulphus Parteius in 3 Thesaurus Juris Romani, Ed. Otto, p. 607, Lex LXXX and in vol. 4, p. 381; also Solon the Athenian, by Ivan M. Linforth, Univ. of Calif. Publications in Classical Philology, vol. 6. The tractatus of Joannes Zeithopf, a scarce and curious little book published 1667, was originally delivered as a public disputation at the University of Leipsic, and afterwards enlarged.

SECTION 81.

[BOTTINI, PAM. 14, CXCVII, 201, § SOLAMQUE SUSPICIONEM.]

And that mere suspicion is not enough for this, viz.: that the punishment should be diminished for a husband who kills his wife after an interval, is evident from the very authorities that excuse him in such a case, assuming that[1] the adultery has been proved either by the confessions of the wife, or by other evidences, so that she can[2] be said to

be "convicted" of it, as is held by Mascard. de probat. concl. 64, n. 8 and 9; Bertazz. cons. crim. 42, n. 10; Caball. resol. crim. cas. 300, n. 26, where he says: "I have seen this followed when the case actually occurred,[3] and the husband excused who had killed his adulterous wife, although she was not found in the very act, but being truly and really such and the fact having been most evidently proved." Hence it is rendered manifest from the very authorities cited by my friend [for the defense][4] that a husband is not excused who kills his wife after an interval from mere suspicion [arising][5] from a suit brought concerning adultery and pending before the Judge to whom the husband himself had gone for aid.[6]

[1] quatenus. [2] valeat. [3] in contingentia facti; Mr. Hodell translates, "in the contingency of such a fact," and credits this quotation to Bertazzolius. [4] per D. meum; Mr. Hodell translates, "adduced by his Honour." [5] perhaps "and" should be supplied rather than "arising." [6] causa sub judice, quem ipse adiuerat, manente. Adiverat from adeo. Mr. Hodell translates, "which he himself had brought."

AUTHORITIES

Those referred to here, cited on the other side, appear to go further than Bottini is willing to admit.

SECTION 82.

[BOTTINI, PAM. 13, CLXIV, 172, § DIXI NIL NOVI.]

I have said that nothing new is brought out by my friends the counsel for the defense,[1] since their special attempt consists in repeating the "causa honoris" on account of the adultery alleged to have been committed by the wife of Count Guido, with the complicity and assistance of her parents, who were barbarously slaughtered with her; [this they do] in order to excite the sympathy of my

most Illustrious Lord [the Governor] and of the Judges,[2] so that not only Guido himself but his associates also should be punished more mildly, according to the authorities cited in his behalf in the first argument, § Hoc stante[3] and the sections following, and § Praedictis nullatenus[4] and likewise the sections following, and in their present argument, § Verum et socios.[5] But the same answer recurs, that the defense of the alleged "causa honoris" can afford no help to the accused by reason of its lack of foundation[6] in fact, and its irrelevancy[7] in law.

[1] per DD. Defensores. [2] the Judges of the Congregation or Court of the Governor. [3] XXV, 27, ante sec. 3. [4] XXXII, 32, ante sec. 63. [5] CXXVI, 134, Ch. XI, sec. 10. [6] insubsistentiam. [7] irrelevantiam.

Section 83.

[Bottini, Pam. 13, clxiv, 172, § Quidquid enim.]

For whatever may be the case,[1] if the mere vehement suspicion of adultery be enough to excuse vengeance taken immediately by the husband upon the wife or her lover because[2] she is found in lustful acts or in those preparatory therefor[3] (because then, on account of his inconsiderate resentment excited by her, which provokes him to anger, the penalty is very often to be moderated according to the circumstances[4] of the case and the persons concerned in it) — however that may be, yet it is certain that for the purpose of avoiding the ordinary penalty of the Lex Cornelia de Sicariis for the murder of the wife committed after an interval, suspicion alone, however vehement, is not enough, but the clearest proof of it is required, resulting either from the confession of the wife herself, or from a judgment of the court

finding her guilty,[5] as in addition to the authorities referred to in my former argument, § Solamque suspicionem,[6] is admitted by these others, who are commended by counsel for the defense, viz.: Mascard. de probat. vol. 1, concl. 64, verb. Adulterium, n. 8 and 9; Bertazzol. cons. 42, n. 1, vers. Quod autem; Caball. resol. crim. cas. 300, n. 26; Matth. Sanz de re crim. contr. 12, n. 15; likewise Dexart. decis. Sard. 5, n. 15.

[1] Quidquid enim fit; Mr. Hodell translates: "For what difference does it make?" [2] ex quo. [3] praeparatoriis ad illud. [4] qualitatem casus atque personaram. [5] sententia condemnatoria. [6] CXCVII, 201, ante sec. 81, where most of these authorities are also cited. I do not think they go as far as Bottini alleges.

Section 84.

[Bottini, Pam. 14, CXCV, 199, § Praecipuum itaque.]

And so the principal assumption of my friend [the Advocate of the Poor] consists in treating as equivalent,[1] first, the case of vengeance taken by a husband immediately by means of the death of the adulteress "detected" in her dishonor, and second, the case of a wife taken after an interval, whenever[2] she is ascertained to be "convicted" of adultery, as he alleges is proved[3] in our case. But this assumption falls to the ground, not only in fact but also in law, and therefore the inference deduced from said equivalence[4] for a moderation of the penalty is likewise shown to be insubstantial.[5]

[1] in parificando. [2] quoties. [3] verificari. [4] ex paritate. [5] insubsistens.

In the next section of Bottini's argument, § In facto, CXCV, he considers some of the facts of the case and then in § In jure, CXCVIII, resumes the discussion of this point of law, following § Solamque suspicionem, 201, CXCVII, ante sec. 81.

Section 85.

[Bottini, Pam. 14, cxcviii, 201, § In jure quoque.]

In law[1] also, the assumption [of the Advocate of the Poor] is disclosed to be insubstantial,[2] which treats as equivalent,[3] first, the case of vengeance taken immediately in the act, that is, of the "detection" [of the wife] in adultery or in acts immediately preparatory,[4] which induce a legitimate suspicion thereof; and second, the case of vengeance taken after an interval when there is no doubt about it,[5] and even with that kind of evidence which makes the adultery most manifest. For although there are not wanting very many authorities who maintain that the punishment should be lessened according to the reason which is adduced by them, namely, that the causa honoris is always urging and inciting to vengeance and that a woman who has confessed or been convicted of it is properly enough said[6] to be "detected" in adultery, which authorities have been collected with a full hand by my friend [the Advocate of the Poor], and several[7] of which I have myself just now pointed out, yet the contrary opinion is the more correct, and accepted in practice, of which distinguished practitioners of our time are witnesses, and the most experienced in criminal law, as namely Farinacius in his said consilium at the end [cons. 141, n. 16 and 17], where he concludes that this is without question his opinion of the law, and advises that it should be so held unless we wish to err, having first learnedly replied to the reasons and authorities cited to the contrary; and Canon Raynaldus, who also filled the office of Procurator of the Poor with the highest praise, and therefore it may be believed that he was very strongly

inclined towards pity and compassion, and that solely from his desire to follow the truth he adhered[8] to this opinion, which he calls the truer and more advantageous to the Commonwealth, and he says that it should not be departed from in the decision of cases, as he holds in his Observationes Criminales, cap. 2, § 4, n. 155, and cap. 7 in rubric n. 118 et seq.

[1] In jure; correspondent with § In facto, CXCV, 199, Ch. VI, sec. 75. [2] insubsistens. [3] parificans. [4] praeparatoriis. [5] quoties de illo constat. [6] satis dicitur. [7] aliquo for aliquot. Bottini refers probably to the authorities mentioned in the preceding § Solamque suspicionem, CXCVII, 201, ante sec. 81. [8] adhaeserit.

AUTHORITIES

Farinacius, cons. 141, is cited above in § Neque obstat, CXCVI, 200, ante sec. 78. See this consilium referred to by Archangeli in § Et in rei, CI, 109, ante sec. 27. Raynaldus, Obs. cap. 7, § 4, says that a husband who does not observe the form of the law is remitted to the ordinary penalty unless that it is mitigated by the sovereign. Farinacius and Raynaldus are referred to in § Quibus praehabitis, XI, 13, ante sec. 10.

SECTION 86.

[BOTTINI, PAM. 13, CLXXXII, 188, § CAETERUM NON EST.]

Besides,[1] the opinion should not be received that even when the adultery is proved, it is lawful for a husband to kill his adulterous wife after an interval without incurring capital punishment, since the weightiest authorities reject that opinion, as in addition to those cited in my argument, § Caeterum[2] as far as § Solumque,[3] and in my reply, § In jure,[4] there may be consulted Bartolus in l. 1, § Cum igitur ff. de vi et vi armata, where, in distinguishing between real and personal injury, he lays it down that when the injury is personal it should be resented[5] immediately, but if it be real it may be resented after an interval; Gomez. ad leg. Tauri

82 [80], n. 58, § Item quia, vers. Sed his non obstantibus, where he says: "But notwithstanding these authorities I hold the contrary opinion,[6] that indeed a husband should be punished with the ordinary punishment of the crime as though he were a homicide,[7] nor can he be excused for it in any way, because in truth he has committed homicide,[8] nor can he exact compensation for a crime,[9] or an offense that is past,[10] except in case where he has killed in flagrante crimine, etc.;" and in the sections following he replies to the arguments on the contrary side; Bellon. de iis, quae fiunt incontinenti, cap. 65, n. 17; Gaill pract. observ., book 2, observ. 101, n. 5, where after he has stated that homicide committed causa honoris is lawful, he says, "But understand that this exception[11] holds good, if the injury is retaliated[12] immediately, otherwise if it occurs after an interval, in which case such retaliation[13] looks like[14] vengeance, rather than the defense of honor, and it is likewise held in respect of insults;"[15] Boss. tit. de Homicid. n. 87; Mart. vot. 306, n. 5 and 6.

[1] Caeterum. [2] LXXVI, 83, ante sec. 75, and Ch. X, sec. 43. [3] LXXVIII, 84, post sec. 87. [4] CXCVIII, 201, preceding section. [5] propulsari. [6] i.e., contrary to the opinion of the authorities holding the milder opinion which he quotes quite fully. [7] tanquam homicida; as one who commits homicide. Mr. Hodell translates, "such a crime as murder." [8] quod vere commisit homicidium; here the crime is indicated. [9] nec potest compensare delictum; to balance one crime with another. [10] vel effensam praeteritam; misprint for offensam; the "ff" resembling the long s's. Mr. Hodell translates, as though the word were essentiam, "its past essence." [11] fallentiam. [12] retorqueatur. [13] retorsio. [14] spectaret; looks to, pertains to. [15] injuriarum may mean injuries or insults, from the citation of Bossius apparently the latter.

AUTHORITIES

Bartolus in l. 1, § Cum igitur, an error for l. 3, § Eum igitur ff. de vi et vi armata, Dig. 43, 16, 3, 9: "Eum igitur, qui cum armis venit, possumus

armis repellere, sed hoc confestim, non ex intervallo." Bartolus in his commentary as to the meaning of confestim, argues that it depends on circumstances; adding that this applies where the injury is "real," but that a "personal" injury must be repelled "in continenti;" he does not, however, define real and personal injuries. See as to this Spreti's argument, § Suppetit quoque, XXIX, 30, ante sec. 39, and Archangeli, § Similiter nil, vers. Sanfelic. at the end, XVII, 17, ante sec. 40.

Gomezius ad leg. Tauri, 80; one of the chief authorities of the Fisc. Gaill, Book 2, Observ. 101, n. 5, not "Gaillard," is slightly misquoted. He says: "Intelligi autem debet hanc fallentiam," etc. Bellonus de potestate eorum, etc., Book 1, ch. 65, n. 17, a general statement as to interval of time showing criminal intent. Bossius de Homicidio, n. 87, is to the effect that one who suffers a verbal insult cannot after an interval resent it by saying "you lie."

Section 87.

[Bottini, Pam. 6, LXXVIII, 84, § Solumque de poena.]

There might have been room for argument about the mitigation of the punishment only if the accused, when he caught his runaway wife in the tavern at Castelnuovo, had killed her with the Canon who was in her company, but since he did not care to take vengeance by his own act, and preferred to take the vengeance of the law,[1] he certainly could not kill her after an interval, as according to the Text in l. quod ait lex, § final ff. ad l. Juliam de adulter. [Dig. 48, 5, 24, 4], affirming that vengeance cannot be postponed after a day,[2] is maintained by Angel. de Malefic. vers. Che hai adulterato la mia Donna n. 21 at the end; Farinac. qu. 125, n. 104, asserting that it is so held in practice lest an opportunity be given to men to avenge themselves by their own authority,[3] and in cons. 141 throughout, and particularly n. 9 et seq., where he confutes Bertazzol. cons. 42, who treats as equivalent[4] the case of a taking in adultery and that where the wife has been convicted of it in such a way that there can be no doubt about it,[5]

lest the husband's suspicion be unjust or too easily aroused,[6] giving as a strong reason for the difference that the just resentment provoking anger, which generally confuses the husband's mind, is proved to exist[7] in the actual[8] detection of his wife in adultery and in acts very close to it, but not after an interval, although his suspicion turns out to be just.[9] And therefore the laws which excuse a husband by reason of his just and inconsiderate resentment, as in l. Gracchus ad l. Juliam de Adulter. and in l. nec in ea lege ff. eodem, cannot be extended to vengeance taken after an interval, because then neither the violence of his resentment, nor his inconsiderate resentment is proved to exist,[7] and the homicide is said to be committed in cold blood.[10] But if, in order that the impulse of a raging resentment may be held in check, lest the husband may take vengeance by his own authority, he is not excused from the penalty of the Lex Cornelia de Sicariis, if he kills his wife after an interval, how much less will he be excusable, if he has chosen the path of public vengeance, by the imprisonment of his wife and her alleged lover, and should, after the interval of a long period of time, have slaughtered her together with her parents in such an inhuman manner?

[1] vindicta facti * * vindictam juris. [2] non posse vindictam post diem differri; Mr. Hodell translates: "one cannot put off the vengeance from day to day." The word "not" is omitted in Everyman edition. [3] se ulciscendi propria auth[oritate] Mr. Hodell translates: "of avenging their own wrongs." The word is written out in full in the same section. [4] parificantem. [5] Mr. Hodell translates: "And he confutes Bertazzolius, who places on the same footing a case of taking in adultery, and says that the wife may be convicted of it provided that there be no doubt about it." [6] Mr. Hodell translates: "Nor may the suspicion of the husband, which gave a strong ground for the difference, be unjust or too ready." [7] verificatur; or, "exists as a fact." See Glossary. [8] in actuali. [9] Mr. Hodell translates: "although his suspicion may be very strong." [10] sedato animo.

AUTHORITIES

Farinacius, qu. 125, n. 403, treats of the excuse of anger occasioned by provocation in general; and says that this does not avail after the resentment and anger have subsided and extraneous acts have intervened, "because then I should believe it ridiculous to say that we should recede from the ordinary penalty; for that would be to open the way to men to avenge themselves by their own authority; and to kill their enemies and afterwards in order to escape the death they had inflicted upon another, to say 'I received provocation; I was injured; and I was struck,' and so almost all homicides would remain unpunished, since hardly any homicide is committed that does not have some preceding provocation."

SECTION 88.

[BOTTINI, PAM. 14, CXCVI, 200, § FATEOR QUIDEM.]

I admit, to be sure, that the accused would have been considered worthy of some excuse, if he had killed his wife in the act of detecting her in her elopement with her alleged lover, since to have this effect, not so much the truth, but even the suspicion that adultery has been committed would be sufficient, as my friend the Advocate of the Poor asserts from the Gloss on l. Divus Adrianus in the statement of the case[1] ff. ad leg. Pompon. [Pompeia] de Parricid. [Dig. 48, 9, 5]. But when after he has neglected his alleged right of private vengeance, he has invoked public vengeance by causing her to be arrested,[2] certainly he could no longer, while she remained under the public authority of the Judge, take private vengeance by butchering her, when she was not apprehensive of any such thing; since indeed[3] the suspicion that arouses just resentment[4] which it is difficult to restrain, excuses in part if not altogether,[5] whenever[6] the husband takes his revenge[7] immediately from the inconsiderate impulse of anger, but this does not also hold good after an interval, and while the cause remains in the hands of the Judge, and the wife has been imprisoned at the defendant's own instance,[8] as will

be proved hereafter[9] by showing the irrelevance of the principal assumption [of the defense].[10]

[1] in figuratione casus; Cf. § Neque obstat. CXCVI, 200, ante sec. 78, where this case is referred to. [2] illam arrestari faciendo. [3] siquidem. [4] suspicio justi doloris excitativa; Mr. Hodell translates: "The suspicion of a just grievance which is difficult to restrain when aroused." See Glossary: participial adjectives ending in ivus, are frequent in the O. Y. B. [5] a quanto, si non a toto. [6] quoties. [7] ultionem. [8] ad ipsius instantiam. [9] referring to § In jure, CXCVIII, 201, ante, sec. 85. [10] irrelevantiam principalis assumpti; for assumptum see § Praecipuum, CXCV, 199, ante sec. 84, § In jure, CXCVIII, 201, ante sec. 85, referring to the "principal assumption." Mr. Hodell translates, "the principle assumed."

Section 89.

[Bottini, Pam. 13, clxxxiii, 188, § Multoque minus.]

And much less can it be alleged that the revenge was taken immediately in that the husband accomplished it as soon as he was able, according to the authorities cited by my friend the Advocate of the Poor in § A qua quidem[1] with the sections following, where he tries to show that since Guido was unarmed, or provided with inferior arms,[2] namely, a sword (yet one used by travellers),[3] he was not able to attack his wife who was accompanied by the Canon, a ready and daring man, and one accustomed to transgress in affairs of that kind, carrying firearms,[4] and who had shown himself ready to die in defense of his sweetheart;[5] it being moreover added that the wife rushed on him with a drawn sword and would have killed him, unless she had been restrained by the police officers. [The argument is ineffectual] because the "opportunity"[6] of killing the adulteress does not so depend on choice,[7] so that a violent death may be inflicted on her with entire security and without any risk,

for with this every legal opinion disagrees that offers an excuse for diminishing the punishment. [This rule only holds] if the homicide[8] follows from the violence of sudden resentment which forces the husband to neglect the danger to his own life, so that he may avenge the injury brought upon him by the adultery. Therefore the first "opportunity"[6] in the opinion of the text writers, in order that the homicide may be said to be committed "immediately," ought to be understood to mean the first time when the occasion offered itself of taking vengeance, thus excusing[9] the husband's delay, either on account of his absence, or on account of some other just reason, as in the case about which Matthaeu Sans[10] wrote in contro. 12. For in that case the adultery had been committed in the absence of the husband and the wife had run away, so that he could not have avenged himself sooner, as appears from the statement of the facts[11] related in n. 1, and in n. 28 he has thus stated his conclusion; "So they are excused, especially if they have taken vengeance as soon as they could, since then it seems that they have killed immediately."

[1] CXXXI, 138, ante sec. 53. [2] imparibus armis; i.e. inferior to the Canon's, who naturally carried firearms. Mr. Hodell translates; "insufficiently." [3] ense tamen viatorio; Mr. Hodell translates; "that is he was girded only with a traveller's sword." This, however, intended for protection on the journey, would naturally be a deadly weapon. I do not know if there was any difference between ensis and gladium, infra. See Arch., § Quoniam, CXIII, 121, ante sec. 51. [4] arma sulphurea. [5] qui se promptum obtulerat pro defensione amasiae mori; Mr. Hodell's translation reverses this: "And the wife showed herself ready to die in defense of her lover." [6] commoditas. [7] non est ita sumenda; not to be so selected. [8] si ea sequatur; referring to "nex illi aleat inferri;" Mr. Hodell translates: "for such diminution of the capital penalty follows," etc. [9] The text is "& *in dictam* sumendi excusando" for "*vindictam* sumendi." [10] Matthaeu Sans; Mr. Hodell translates Matthaeus Sanfelix. Sans in the

text (for Sanz) is printed with the long "s"; and so Matthaeus (Antonius) the Dutchman, and Sanfelicius the Italian, are confused with the Spanish writer. The case cited is that of Francesco Palomeque in Appendix. [11] ex serie facti.

Section 90.

[Bottini, Pam. 13, clxxxiii, 189, § Quis autem affirmare.]

But who can maintain that the husband in our case took the "first occasion,"[1] since when he found his wife in the very act of her elopement at the tavern at Castelnuovo, he abstained from vengeance in fact, and flew to vengeance of the law, which he has always [since] prosecuted.[2] And surely he accuses himself of excessive cowardice in asserting that he was unequal to executing vengeance, on account of the fierce disposition of the Canon, because when Guido found that the latter had been arrested,[3] he could have made an attack upon his wife. Nor should the nature[4] of their arms have frightened him, because according to the description given of them in the record of the prosecution, it appears that the Canon was carrying only a sword,[5] and so they were provided with equivalent arms; nor would he have taken such care of his own safety if he had been driven on, by the spurs of his honor that demanded reparation, to take vengeance even with some risk to himself; for just resentment knows no limit. And he ought to blame himself if, alone and with inferior arms, he pursued his wife who was escaping, as he might have feared, with her strong and better armed lover. And his very manner of pursuit argues rather that his purpose was turned toward legal vengeance for winning the dowry money, than to vengeance with his own hand for recovering his

honor. For what is done best shows what was the intention,[6] as according to the Text in l. 1, § fin. ff. de dol. [Dig. 44, 4, 1, 2 de doli mali, etc.] is held by Grammat. cons. 13, n. 2 and 3, and decis. 37, n. 6; Mascard. de probat. book 1, concl. 95, n. 1 and 2; Farinac. in fragm. Crim. in part 1, Letter B, verb. Animus, in number 228.

[1] occasionem. [2] semper prosecutus fuit; Mr. Hodell translates, "to which he had always clung." [3] repiebatur arrestatus. [4] qualitas. [5] ensem. [6] Factum enim optime ostendit, qualis fuerit animus; a brocard. Mr. Hodell translates, "for facts will show that such was his thought."

AUTHORITIES

Grammaticus, dec. 37, n. 6: "talis animus praesumitur, qualia sunt verba vel facta." Mascardus, conclus. 95, n. 1: "Animus ex qualitate facti praesumitur." Farinacius, Frag. Crim. Animus, n. 228, "Talis praesumitur animus, qualem facta demonstrant." Grammaticus, cons. 13, n. 2; "Cum animus et voluntas ex gestis inde sequutis judicandus sit."

SECTION 91.

[BOTTINI, PAM. 13, CLXXXIV, 189, § DILATIO PARITER.]

The delay, likewise, of Guido's vengeance until after his wife's return to her father's home, excludes the alleged mitigation[1] that it was taken immediately, because it could not have been put into execution sooner. For that event occurred on October 12 of last year, and the murder was committed upon January 2, of the present year; and it should rather be affirmed that he had waited for her confinement which took place on December 18, so that the succession to the property should be ensured for which her husband's mouth was watering,[2] since he immediately put into execution his wicked plan for destroying his wife and her parents with frightful slaughter. So that from this comparison of dates,[3] it will be easy to discern,

and it is even manifest therefrom, with what intention he perpetrated the crime, and whether, for the sake of the asserted restoration of his injured honor, his vengeance can be said to have been undertaken immediately, that is, as soon as "opportunity" and "occasion" offered, according to the authorities cited on the other side.

[1] qualitatem. [2] ad quam maritus inhiabat. [3] ex combinatione temporum.

This is one of the strongest arguments of the Fisc, and forcibly stated. See note of A. K. Cook, p. 69.

Section 92.

[Bottini, Pam. 13, clxxxiv, 190, § Electa pro inde.]

Therefore after he had elected legal vengeance by the imprisonment of his wife and her alleged lover, and by the prosecution of a criminal suit, he could not lawfully go back to vengeance by his own act, and in taking it he cannot be said to have undertaken revenge immediately; and he violated the public majesty of the Courts, or rather that of the supreme power of the State,[1] which circumstance alone very greatly increases the penalty and raises the grade of the crime, as the Text advises in l. quod ait lex, § fin. ad leg. Jul. de Adulter. [Dig. 48, 5, 24, 4]; Angel. de Malefic. vers. Che hai adulterato la mia Donna, n. 21 at the end, with other authorities referred to in my previous argument, § Solumque.[2]

[1] supremi Pricipis majestatem. [2] lxxviii, 84, ante sec. 87.

Section 93.

[Bottini, Pam. 13, clxxxv, 190, § Absque eo quod.]

[And this is so] notwithstanding the fact that[1] the conclusions deduced by my friend the Advocate

of the Poor in § Et tantum abest,[2] with the sections following, may apply, and the authorities which confirm the same, viz.: that the injury is not presumed to be passed over by the husband, but rather there is presumed a continuation of his intention to avenge himself, which does away with the element of treachery,[3] although the husband may have used dissimulation in order to take vengeance. Because the question at hand[4] does not concern the character[5] of the homicide, — although that may truly be alleged to be treacherous,[6] — nor did the husband dissemble his injury but rather made it public by hurrying off to the vengeance of the law, and although this perhaps may be less honorable, yet since he pleased to do so, in order to gain the dowry, he could not after he had been disappointed in his hopes, because the adultery was not proved, have recourse to vengeance by his own act, alleging as an excuse for the delay, that forsooth he had not been able to accomplish it sooner. For since the delay and difficulty had arisen from his own act, he could not thereby lay hold of the protection of this excuse; according to the rule in the Text in cap. Damnum, de regul. Jur. in 6 [Sexti Decretal. V, Tit. 12, Reg. 86]; Rot. decis. 345 in number 15, part 17; and in decision 609, n. 12, part 18 rec.

[1] Absque eo quod. [2] CXXXII, 139, ante sec. 55. [3] proditionis exclusiva. [4] quaestio in praesentia. [5] qualitate. [6] ex quo proditorium praetendatur.

AUTHORITIES

Text in cap. Damnum, "For the loss which one incurs by his own fault, he should blame himself and not others:" Damnum, quod quis sua culpa sentit, sibi debet, non aliis imputare. Rota Rec. Dec. part 18, dec. 609, n. 12; "It was his own fault, and he had himself to blame:" Sibi debet imputare impedimentum in quo incidit.

This section is a very good, that is, a very bad, example of Bottini's peculiar style.

CHAPTER IX

THE ARGUMENT AS TO THE HOMICIDES OF THE COMPARINI

THE ARGUMENT IN BEHALF OF THE DEFENSE

The same defense of causa honoris applies to the case of Pietro and Violante. Section 1

1. Because they disowned Pompilia, for either:

a. She was in reality their child, in which case their denial of her parentage was injurious and insulting to Guido's honor. 2

b. Or else she was not their child, but that of a dissolute woman, in which case the injury was even greater. 3

2. Because Violante and Pietro instigated Pompilia to intrigue with Caponsacchi and to poison Guido. 5

3. Because Violante and Pietro not only so instigated Pompilia, but received her again into their home; for either they inflicted a new wrong or increased the former. 6

4. Because the doubtful paternity of Pompilia's son, born after their reception of her, inflicted a further injury to his honor. 12

5. Because in such circumstances causing just resentment, even the homicide of an innocent person is excusable. Section 13

6. Because Pietro and Violante, being accessories to the adultery, are subject to the same penalty as Pompilia, the principal. 15

7. Because the civil suit against Guido, founded on Pompilia's parentage, and the libels of the Comparini, by distributing pamphlets about the lawsuit, are reducible to the same causa honoris. 16

Section 1.

[Arch., Pam. 1, xviii, 19, § Demum ob homicidia.]

Finally, we do not believe, from what is above concluded, that the penalty can be increased on account of Pietro and Violante having been killed, since the same causa honoris which impelled Count Guido [to kill his wife] also forced him to destroy her said parents.[1] And now may the ashes of the dead spare me, if what I have related above, and what I am about to say, may seem to disturb their peace, because neither the flame of hatred nor the impulse of anger — the causes of which I keep far from me — have suggested these things, but the exigencies of our defense, which I have assumed without a tittle of compensation,[2] compel me to bring before the Court[3] everything that may lead to the desired end.

[1] dictos conjuges; the literal translation would be awkward. [2] non uno titulo assumptae. This translation is doubtful. As Procurator Pauperum Archangeli was bound to undertake the defense, but if Guido were able to pay a fee, it would appear that Archangeli was entitled to expect it. [3] in medium proferre. Mr. Hodell translates: "to employ every means." It is a frequent expression signifying to bring before the public, or the Court.

Section 2.

[Arch., Pam. 1, xix, 19, § Dixi et ut puto.]

I have said, and as I think not unfairly, that the accused[1] sprang forth to the extermination[2] of both these persons, moved solely by an injury done directly to his own reputation. For, a few months after his marriage, contracted with Francesca, whom they had professed to be their daughter, they did not blush to declare that she was not such. Hence there appears this inevitable dilemma: Either [first][3] she was really and truly[4] their child, and [then] we are forced to confess that by afterwards denying her parentage, they had inflicted the greatest injury upon the honor and reputation of the accused.[1] And great hatred and malice [must have been] entertained by them against him, since they did not mind disgracing their own daughter in order to involve him in dishonor, as though he had married the daughter of a most worthless and dissolute woman. And this one fact is true,[5] whoever knows Count Guido supposes that he has united himself in marriage with a girl not merely beneath him in rank, but even of the lowest baseborn condition, and this very greatly damages the reputation of his whole family.

[1] Dominum Inquisitum; as if we should say Mr. Defendant. [2] internicioanem. [3] correlative with § Aut in veritate following. [4] vere et reliter. [5] Hoc unum est.

Section 3.

[Arch., Pam. 1, xix, 20, § Aut in veritate.]

Or else [second] Francesca was in truth begotten by an unknown father and born[1] of a dissolute washerwoman.[2] And it cannot be denied that in

this case he has been affected with a greater injury, which branded the mark of infamy upon him, not only with respect to her birth, but also because daughters are not unlike their mothers; Cephal. cons. 140, n. 30; Farinac. cons. 24, n. 15 and qu. 136, n. 99; Boss. in Pract. tit. de Plur. violent. n. 68 at the end. And there is the Text in cap. Si gens Anglorum 56 dist.,[3] where we read: "From such mingling of harlots, it is to be supposed that nations degenerate, ignoble, and burning with lust, will be produced." And would that experience had not taught us this fact!

[1] in lucem edita, brought forth into the light of day. Cf. § Si ultima, CXVI, 124, post sec. 7. [2] per inhonestam lotricem; Mr. Hodell translates, "harlot;" see § Domum reversi, IX, 11, Ch. VI, sec. 2. [3] Decretum, Part 1, dist. 56, ch. 10, written to King Ethelbald.

AUTHORITIES

Farinacius, qu. 136, n. 99: "The ninth presumption of a woman's dissolute character is that which arises from the dissolute life of her mother." Cons. 24, n. 15, is to the same effect. Bossius de Plurimis violentiis, n. 68: "She is presumed to be incontinent whose mother was so." So Cephalus, cons. 140, n. 30: "An evil tree cannot bring forth good fruit." Cf. also § Si ultima, CXVI, 124, post sec. 7.

SECTION 4.

[ARCH., PAM. 1, XIX, 20, § CREDIDIT INFELIX.]

The unfortunate man believed that he was marrying the legitimate daughter of Pietro and Violante,[1] and notwithstanding, by the design and deceit of this couple, he had married a girl of deplorable condition in life,[2] conceived illegitimately[3] by a dissolute mother. From this it is proper to infer of what character were the aforesaid couple,[4] who, in order to defraud those who were legally entitled[5] to the Fideicommissum, had

substituted this most baseborn child,[6] never thinking that they were [thus] rendered liable to capital punishment. L. prima C. ad leg. Cornel. de fals. [Cod. 9, 22, 1]; Marsilan. l. si mulierem, n. 3, ff. ad leg. Cornel. de Sycar. [Dig. 48, 8, 8]; Jo. de Anan. in cap. Ad. falsarium [falsariorum] n. 11 in fin. de Crim. fals. [Decretal. V, 20, 7]; Boss. in Pract. tit. de Partu Supposito n. 1; Boer. dec. 82, n. 8 at the end; Afflict. decis. 404, n. 17 at the end, vers. Item in eo; Peguer. decis. 80, n. 8.

[1] ex legitimo matrimonio natae. [2] puellae deploratae conditionis, a girl who was a nobody. [3] fornicario coitu. [4] cujus qualitatis; what sort of people were this husband and wife. [5] legitime vocatos, i.e., mentioned by name, in the deed, and so "called to the inheritance." [6] partum vilissimum supposuerunt; Mr. Hodell translates: "had made most vile pretense of the birth of a child." This refers to the suit brought by Pietro and Violante after the latter's disclosure of the real parentage of Pompilia, to recover the dowry. The suit is referred to by Spreti, § Absque eo quod, XXXIII, 33, Ch. X, sec. 25. The phrases partus suppositus and suppositio occur frequently in the O. Y. B.; partus suppositus means the substitution of a newborn child, cf. Italian, supporre, to change a baby at birth. It is a technical term, used of a crime that seems to have been not uncommon; in fact, partus suppositus was a recognized title of the criminal law, regarded as a species of the Crimen falsi under the Lex Cornelia Falsi like counterfeiting. See Clarus, lib. 5, § Falsum, n. 203; Carpzovius, Part 2, qu. 93, n. 27, etc. Farinacius, qu. 150, n. 239, discusses the topic very fully; see Bossius Tractat. Varii, de Partu Supposito, p. 210 of Ed. of 1584; Bossius in n. 1 gives the important case of Eleanora Corrigia, wife of Count Eleutherius, who with his knowledge feigned pregnancy and the fictitious birth of a son, who claimed to be the heir. The offense was punishable with death, Peguera, dec. 80, n. 8.

The reference to Boerius, dec. 82, is not important. The crimen partus suppositi being a capital offense, Pietro and Violante in bringing this civil suit, grounded on their own fraud, exposed themselves, or at least Violante, to a criminal prosecution. Afflictis, dec. 404, n. 17, cited in the text says, however, that capital punishment was not regularly inflicted. See Martinus Praxis Criminalis, cap. XXVIII. Partus suppositus is by no means unknown in modern times. The case, for example, of the deception practised on Robert Ray Hamilton was a celebrated instance in the latter part of the 19th century.

Section 5.

[Arch., Pam. 1, xx, 20, § Non erit igitur.]

It will not therefore be difficult to believe what Francesca alleged[1] in her letter to her brother-in-law, that the aforesaid couple, although she herself was being well treated, were daily urging her to destroy her husband, brother-in-law, and mother-in-law with poison, and to burn the house down. And, although these things are very bad, they gave her still worse advice[2] even according to the strength of her filial duty of obedience,[3] namely, that after their own departure from Arezzo, she should entice a lover, abandon her husband's home in his company, and hasten to the City; and accordingly like a most obedient daughter, she complied with their commands all too readily. Who then will deny that such a daring and sacrilegious deed,[4] by which notorious[5] disgrace was inflicted upon the entire family of the accused, should be attributed to the wicked persuasion of the said couple? Nor was it difficult to persuade that girl to do that to which she was inclined by inborn instinct and her mother's example.

[1] supposuit. The letter is in LV, 56, addressed to the Abate Paolo. [2] pessima * * adhuc pejus; worse than the worst. [3] in vim obedientiae. [4] ausum temerarium; not "reckless daring;" from temerare, to desecrate. Cf. § Coadunatio, CLXXXIX, 193, Ch. X, sec. 56. [5] Perhaps referring to the subsequent decree in the Prosecution for Elopement, or simply notorious in the ordinary sense.

Section 6.

[Arch., Pam. 1, xx, 21, § Ad quid autem.]

It is not my place to divine why that couple should so anxiously desire the return of Francesca to their home, yet I cannot persuade myself that

they were moved by pure love, in order, namely, that she might extricate herself from ill treatment; since[1] Francesca in her letter above mentioned, confesses that she is leading a quiet life, and that her husband and the family[2] are getting along very well with her, and that the things which she had laid before[3] the Very Reverend Bishop had been falsely invented by the said couple. I know moreover that if a husband knows of the adultery of his wife, and keeps her at home, he cannot avoid the brand and punishment of pandering. L. 2, § Lenocinii [Dig. 48, 5, 2, 2] l. Mariti Lenocinium ff. ad leg. Jud. de Adult. [Dig. 48, 5, 30]; l. 2 Cod. eod. [Cod. 9, 9, 2]; Menoch. de Arbitrar. cas. 534, n. 23; Farinac. qu. 144, n. 94 and 98. If therefore, as the said couple were vociferating,[4] Francesca was not their daughter, why did they receive her so very tenderly into their home after her adultery had been so plainly detected? and why, so to speak, did they cherish her in their breast, not merely until the birth of her child, but even until her death? And would that her amours with her banished[5] lover had not continued there! for at the mere mention of his name, when they understood from the knocking at the door that [some one] was about to give them a letter from the banished[5] man, immediately the door was thrown open, and the husband made his entrance to recover his honor. For, if the said couple had been displeased with the adultery of Francesca, they would indeed without doubt, have shuddered at the name of the adulterer, and would have obstructed[6] every means of their mutual correspondence.[7] Therefore it appears most clearly that the "cause of injured honor" had continued in the accused,[8] nay rather that new causes had arisen [which were] of the

same kind, because they all tended to disgrace[9] his reputation.

[1] dum. [2] domesticos; perhaps servants, but in the letter Pompilia does not mention them. See this word in § Sed cessare, LXVI, 70, post sec. 20. [3] supposuit. [4] exagerabant; literally piled it up, exaggerated. [5] literally, relegated. [6] astruxissent; for obstruxissent. [7] correspondentia; has the double meaning of intimacy or correspondence by letter, see Glossary. [8] Domino inquisito; Mr. Defendant. [9] deturpandum; rarely used, means "disfigure."

AUTHORITIES

Dig. 48, 5, 30: "Mariti lenocinium lex coercuit, qui deprehensam uxorem in adulterio retinuit adulterumque dimisit." Cod. 9, 9, 2: "Crimen lenocinii contrahunt, qui deprehensam in adulterio uxorem in matrimonio detinuerunt, non qui suspectam adulteram habuerunt." The citations from Menochius and Farinacius merely amplify the matter. Under the first reference to the Digest the husband who retains his adulterous wife is a publicus leno; under the second reference to the Codex the law is extended to others who receive her after her detection. These authorities are cited by Spreti, § Firmo itaque, CCXXVIII, 231, post sec. 11, to show the responsibility assumed by the Comparini through their reception of Pompilia after the decree in the Processus Fugae; here the meaning may be that they were willing to receive her because they knew that Guido when he should discover her adultery might drive her from his home, i.e., if Guido had not killed her, he would have been obliged at least to send her away, as home was no place for her.

SECTION 7.

[ARCH., PAM. 8, CXVI, 124, § SI ULTIMA POENA.]

If Count Guido should not be punished with the extreme penalty[1] for having killed his wife, for the same reason he cannot be [thus] punished for having killed Pietro and Violante, because these homicides were committed for the same causa honoris; not only because[2] at their instigation Francesca found her lover, but also because,[2] in order that Count Guido might be the more reviled, they did not blush to declare that Francesca had been begotten illegitimately and born into the world[3] by a prostitute, which greatly disgraced the honor of the whole house, as Gratianus observes,

discept. 863, n. 4, 5 and 6; — and the daughters of such generally resemble their mother,[4] — but further because,[2] as I have said above, the accused burned with anger when he had notice of the return of Francesca to their home, page [of the record] 318 (reverse), and the following pages. And Alessandro proves this in his confession, page 646, where he says: "So that he had to kill his wife, his mother-in-law and his father-in-law, because the said mother-in-law and father-in-law had a hand in making their daughter do evil, and had acted as ruffians to him." And what makes it clearer, on that fatal night[5] when they were slain, he knocked on the door and as soon as Violante heard that dearest name of the lover, she instantly opened it, and thus showed what, unless I am mistaken, removes any doubt that Pietro and Violante were not displeased with[6] the amours of their daughter and her lover.

[1] ultima poena; that is of course death. Mr. Hodell translates: "If therefore Count Guido is not to be punished for murder of his wife," etc., omitting the other words. [2] tum qua * * tum quia * * tum etiam. [3] in lucem aeditam. Cf. § Aut in veritate, XIX, 20, ante sec. 3; the phrase is often used of the publication of a book. [4] Cf. § Aut in veritate, XIX, 20, ante sec. 3; Burton Anat. Melan. Part 3, § 3, mem. 4, subsec. 2. [5] in fataii sero; for fatali. [6] aegreferrent; see Glossary.

AUTHORITIES

Gratianus, cap. 863, n. 4, is speaking of a testamentary prohibition of a son's marriage with a certain woman, and says that it has more weight when the testator is consulting the honor of his house and family, which is greatly disgraced by marriage with a woman of low social standing or of dissolute life.

SECTION 8.

[ARCH., PAM. 8, CXVI, 125, § HOC UNUM EST.]

This one thing is true[1] either that we are compelled to admit [first] that the Comparini had

given him a new cause injurious[2] to his honor by receiving her into their home after they had declared that she was not their daughter, and her adultery was clearly manifest,[3] and consequently there should be a diminution of the ordinary penalty, as is well said by Bertazzolius, cons. 434, n. 15, vers. Verum sumus: — although[4] just resentment when conceived always presses on the heart and stimulates to vengeance, as besides the authorities cited in our other argument, is said by Joseph Mele in his additions to Gizzarellus, dec. 18, n. 5. —

[1] Hoc unum est. [2] laesivum. [3] de adulterio illius manifeste constabat. [4] quamvis, Mr. Hodell translates "for." The reception of Pompilia was a fresh cause of injury *although* no new cause was needed, for the "just resentment" was a continual cause as stated in the next section. The argument is indeed rather confused, as frequently occurs in the O. Y. B., doubtless because (as I think) the counsel dictated their briefs and had no time to revise them.

AUTHORITIES

Bertazzolius, cons. 434: an argument in favor of a defendant who caused to be killed one who repeatedly threatened his life and finally threatened him again in writing. This, Bertazzolius argued, was a new injury so that the defendant might be said to have avenged himself "incontinenti." The editor adds that the defendant escaped death.

SECTION 9.

[ARCH., PAM. 8, CXVII, 125, § AUT ADHUC DURASSE.]

Or else [secondly we must admit] that a cause of just resentment continued, and was indeed increased, which is sufficient ground for the assertion that the homicides are said to be committed incontinently, as conspicuously appears in such cases[1] in Ruin. cons. 2, n. 7, after the middle, vers. Durante igitur, Book 5; Honded. cons. 104, n. 30, vol. 1; Bertazzol. cons. 434, n. 15, vers. Praeterea;

Joseph Mele in his additions to Gizzarell., dec. 18, n. 15 et seq.; de Ponte, de potest. Proreg. tit. 2, § 3, n. 32.

[1] ut egregie in terminis.

AUTHORITIES

Bertazzolius, cons. 434, n. 15, also cited in § Hoc unum est, preceding section. He says here: "Besides when a continuous injury is done to any one, it may be avenged after an interval." Ruinus, vol. 5, cons. 2, n. 7, also cited in § Placeat interim, CXIV, 123, Ch. VIII, sec. 58. Hondedeus, vol. 1, cons. 104, n. 30, a case of homicide provoked by continued insults, offensive to honor, held not punishable by death, although the insults were not immediately resented.

SECTION 10.

[ARCH., PAM. 8, CXVII, 125, § CUMQUE TUM.]

Since then it is evident, not only from Guido's confession, but also from that of his associates, and also finally from so many proofs collected in the prosecution,[1] that Guido was led to kill these people by the causa honoris, in vain does the Fisc allege that he committed these crimes for some other cause having no connection therewith.[2] For, to confess the truth, I find no other cause that does not touch and wound the honor, if we bear in mind the reasons which Count Guido recounts in the record of the prosecution, pp. 96, 97; namely, that the said Comparini had brought about the elopement of Francesca, and that they had plotted against his life, which of itself would be enough to enable him to escape from the ordinary penalty. See Bertazzolius cons. 433 and 434; Grammaticus dec. 5, throughout; where they affirm that a man was punished more mildly, who ordered one who threatened him to be killed, although the threats were not fully proved, as appears in n. 16, vers. Et si dicatur. He is

followed by Tob. Non. cons. 109, n. 6; and the Texts are clear in l. prima C. quando licet unicuique [Cod. 3, 27, 1] where we read: "And the death with which he threatened others let him receive himself, and what he planned let him incur;"[3] and in l. si ut allegas, C. ad leg. Cornel. de Sycar. [Cod. 9, 16, 2], where we read: "There is no doubt that he who had gone forth with the intention of inflicting death seems to have been justly slain."

[1] The Processus Fugae. [2] ex alia causa extranea; Mr. Hodell translates: "some other remote reason." [3] Whoso diggeth a pit shall fall therein," Proverbs XXVI, 27; "He that diggeth a pit shall fall into it," Ecclesiastes, X, 8.

AUTHORITIES

Grammaticus, dec. 5; there the defendant killed a man who threatened that he would dishonor the defendant's sister. The threat was against the defendant's honor. The case is cited with approval by Tobias Nonnius, cons. 109, where, however, a similar offense had been actually committed. Tobias Nonnius and Bertazzolius cited in § Et quatenus, CXXXIII, 140, Ch. V, sec. 23; Bertazzolius in § Hoc unum, CXVI, 125, ante sec. 8; Grammaticus, dec. 5 is cited very frequently.

SECTION 11.

[SPRETI, PAM 16, CCXXVIII, 231, § FIRMO ITAQUE.]

As therefore it remains firmly proved[1] that Count Guido had a just cause for killing Francesca Pompilia his wife, or causing her to be killed, the same must necessarily be said[2] as to the homicides of Pietro and Violante, his father-in-law and mother-in-law; because in the prosecution framed on the occasion[3] of the elopement of the said Francesca Pompilia from her husband, there also came to light the proof, that they themselves had conspired in that same crime, consequently they were included in the cause of the wounded honor and reputation of the said Count Guido, and this injury to his honor resulted also from this fact,

which they themselves alleged and proclaimed to all, that his wife was not their daughter and not even legitimate, but the daughter of a prostitute, and subsequently they received her into their home after she had been declared an adulteress. For either she was their own daughter, and then they should not have denied it in a judicial proceeding,[4] or she was in truth not their daughter, and then they should not have received her into their home, after she had been convicted of adultery, since by behaving in such a way they by the very act declared themselves to be her panders, and to be willing to be such, l. 2 § Lenocinii [Dig. 48, 5, 2, 2]; l. mariti lenocinium [Dig. 48, 5, 30 (29)], ff. ad Jul. de Adult.; l. 2 C. eodem [Codex 9, 9, 2]; Menoch. de arbitr. cas. 534, n. 23; Farinac. qu. 144, n. 94 and 98.

[1] Firmo remanente. [2] necessario dicendum venit. [3] occasione fugae. [4] judicialiter.

AUTHORITIES

Spreti cites the same authorities as Archangeli does in § Ad quid autem, XX, 21, ante sec. 6.

SECTION 12.

[ARCH., PAM. 1, XXI, 21, § QUAMOBREM PUTO.]

Therefore I think that any judicious man ought to acknowledge that Guido had a very just cause for killing the said couple, and that his very just resentment had been aroused; and moreover this was increased day by day, by the natural consideration[1] that he would not have married Francesca had he not been deceived by that very crafty couple. And to the foregoing it is added that, either [first] the child born[2] by Francesca had been conceived of the adulterer, as the accused might

well believe since he was ignorant at the time of his wife's elopement that she was pregnant, and then it cannot be denied that a new cause of resentment had been raised, or that the prior cause had been renewed; or [secondly] that the child had been begotten by his lawful father, and [then] who will deny that through the concealment of the child, Guido ought to have been angered afresh by the loss of his son? The very great resentment conceived from either cause is of the greatest strength, and is so deserving of excuse that very many atrocious crimes perpetrated upon the impulse of just resentment have remained[3] absolutely unpunished, as is noted by Alex. ab Alex. in Summ. 4, par. qu. 86, membr. 3, art. 1; Tiraquell. de Poen. temp. caus. 1, n. 16 at the end; with which agrees the Text in said l. Gracchus C. ad leg. Jul. de Adult. [Cod. 9, 9, 4]: "Nevertheless because the night time and his just resentment mitigate the deed, he can be sent into exile." Harprecht. in § Item lex Cornel. de Sycar. n. 212, Instit. de Publ. Judic. [Inst. 4, 18, 5]; Abbas. in cap. olim, n. 6, de Rescript. [Decretal I, 3, 25]; Angel. in l. Si adulterium, § Imperatores n. 2, ff. ad leg. Jul. de Adult. [Dig. 48, 5, 39, 8]; Rimin. Jun. cons. 136, under n. 6 inter cons. Crim. divers. book first; Bertazzol. cons. 243, n. 7 and cons. 286, n. 6 and cons. 505, n. 30; Giurb. cons. 86, n. 8, vers. Et ubi justo dolore; Prat. Respons. 25, n. 41; Conciol. Alleg. 87, n. 4.

[1] humana consideratione. [2] partus aeditus. [3] impunita remanserint; "gone unpunished." Remanere used as an auxiliary.

AUTHORITIES

Tiraquellus de Poenis temp. caus. 1, n. 16, cites Deuteronomy, ch. 19, and quotes Alex. ab Alex. as saying: "Many things done under the impulse of resentment remain unpunished which, if they were done after resentment ceased, should be punished." Bertazzolius, cons. 243,

n. 7, quotes "quia dificillimum est justum dolorem temperare," § Imperatores so often cited; in cons. 286, n. 6, the defendant had come to his brother's assistance in a deadly assault: "And it cannot be denied but that the penalty should be moderated on account of his just resentment when he saw his brother thus wounded." In cons. 505, n. 30, the usual citations. Giurba, cons. 86, n. 8, the case of Sylvester Cardile before cited, § Proinde, xv, 17, Ch. VIII, sec. 18. In n. 8: "And when any one does wrong under the influence of just resentment he is punished more mildly, * * for a man agitated by hot passion is not in the fullness of his intellect * * and it is difficult to restrain anger * * hence a defendant is excused from his crime at least so as to be punished more mildly." Conciolus, Alleg. 87, n. 4, applies the same principle to crimes committed under the influence of violent love.

Section 13.

[Arch., Pam. 1, xxii, 22, § Et non semel.]

And not infrequently, when the case has actually occurred,[1] they have escaped without punishment who, being actuated by just resentment, have laid their hands even upon the innocent. For a certain Smyrnean woman had killed her husband and her own son whom she had by him, because[2] her husband had slain a son of hers by a former marriage. When she was afterwards accused before Dolabella, the Proconsul, he was unwilling either to liberate one who was stained with two murders or to condemn her, inasmuch as she had been moved by just resentment. He therefore referred the case to the Areopagus, that assembly of the wisest Judges, who after they had investigated it,[3] gave their opinion that the woman and her accuser should come back after a hundred years. And so a woman accused of a double parricide,[4] although she had even killed an innocent person, escaped absolutely without punishment, as is related by Valer. Max. Dictor. factor. memorab. lib. 8, cap. 1 de Public. Judic. vers. Eadem haesitatione; Tiraquell. de Poen. temperand. caus. 1, n. 17, about the

middle; Menoch. de Arbitar. cas. 356, n. 60; Cyriac. cons. 105, n. 39; Gramm. dec. 5, n. 23.

[1] in contingentia facti. [2] ex quo. [3] cognito de causa; a peculiar ablative absolute. [4] duplici parricidio rea.

AUTHORITIES

Tiraquellus, Menochius, Cyriacus, and Grammaticus all repeat this favorite story; also to be found in Rabelais, Book 3, ch. 44, and in Aulus Gellius, book 12, ch. 7. According to Rabelais the husband and son were both guilty of the murder of the oldest child. Pantagruel tells the story to justify Judge Bridlegoose in his method of decision by dice. See also Raynaldus Observ., cap. 6, § 1, n. 49. Tiraquellus refers to a similar case related by Dositheus and quoted from him by Plutarch in his Parallels, ch. 71. The reference to Valerius Maximus is in Book 8 of the Memorabilia, ch. 1, under the heading "Ambustae," "singed," or "scorched," i.e., saved from the fire.

SECTION 14.

[ARCH., PAM. 1, XXII, 22, § SIMILITER UXOR.]

Likewise a wife who had delegated to another the homicide of her husband by reason of her just resentment on account of his refusal to preform his marital duty, was punished with a pecuniary fine, and sentenced to a temporary residence[1] in a monastery, as Cyriacus affirms, Contro. 105 at the end.

[1] ad temporalem permanentiam; see Glossary. Cyriacus says "condemnata ad standum in monasterio ad certum tempus."

AUTHORITIES

Cyriacus, contro. 105; insufficiently stated, as in addition to other facts the wife was cruelly treated so that her health was impaired, and the husband kept a mistress. This controversia is extremely curious.

Cyriacus, contr. 105, n. 77, is cited in § Et idem practicatum, XVI, 17, Ch. VIII, sec. 19.

SECTION 15.

[SPRETI, PAM. 2, XXXIII, 32, § NON AUTEM CAUSA.]

Nor moreover is this causa honoris lacking[1] in respect to the said homicides of the father-in-law and mother-in-law, for their conspiracy being

established[2] in the adultery committed by their daughter, they were themselves [concerned] in the "causa" of the injury and disgrace which resulted therefrom to the destruction of the honor and reputation of Count Guido, their son-in-law and her husband respectively;[3] therefore they themselves should by law have been punished with the same penalty as [Pompilia] the principal offender,[4] according to the Texts set forth in leg. Qui domum [Dig. 48, 5, 9 (8), Pr.], and the Gloss thereon; in leg. Et si amici, with the law following ff. ad leg. Jul. de Adulter. [Dig. 48, 5, 10 (9), 1]; and in leg. 1, § Fin. ff. de extraordinariis criminibus [Dig. 47, 11, 1, 1]; Natt. cons. 151, throughout, vol. 1; Pascal. de vir. patr. potest. part 2, cap. 10, n. 20. And so they gave Count Guido sufficient cause for avenging himself upon them.

[1] non causa cessat. [2] stante conspiratione habita. [3] respective. [4] Ipsi (i.e., Pietro and Violante) de jure puniri debuissent eadem poena qua principalis. Mr. Hodell translates: "therefore these murders likewise ought to be punished with the same penalty as the principal."

AUTHORITIES

In Natta, vol. 1, cons. 151, the defendant decoyed the husband from his home and prevented his return, meanwhile his confederates were enabled to commit adultery with his wife. Natta argued that the defendant should be punished with the same punishment. The decision of the court is not given. Paschalis de viribus, part 2, ch. 10, n. 20, cites this consilium.

The texts from the Digest relate to the guilt and punishment of those who lend their aid to the commission of such a crime as Pompilia's.

SECTION 16.

[SPRETI, PAM. 2, XXXIII, 32, § ADDITO INSUPER.]

It is to be added[1] moreover, as will be proved in fact, and Guido himself asserted in his examination,[2] that these persons inflicted further damage[3] to his reputation by means of[4] the civil suit

instituted by them as to the fictitious parentage[5] of the said Francesca Pompilia; and further by their publishing and distributing not only here in the City, but also in his own country, most biting pamphlets written — nay, even printed[6] — about this same lawsuit, so that it cannot be denied that Guido from this cause also conceived just resentment and provocation, and had a just cause for taking vengeance, according to the Text in cap. 1, de iis qui fil. occid. [Decretals V, 10], where Alexander III issued his rescript to the Bishop of Tournay that a certain woman, who had killed her son because she was reproached by her husband on the ground that the boy had been conceived in adultery, should be committed to a monastery. For in crimes in which anger does not [altogether] excuse, nevertheless one who transgresses in anger, which has its origin from just resentment, should be excused[7] to some extent[8] as Gonzal. notes upon the aforesaid Text in n. 2, and Menochius affirms de Arbitr. cas. 356, n. 59.

[1] addito, the construction so often used in the O. Y. B. [2] in suis constitutis, see Glossary. [3] aliud praejudicium. [4] mediante lite. [5] suppositionis partus dictae Franciscae; literally the "child-substitution of Francesca." See note, § Credidit infelix, XIX, 20, ante sec. 4. [6] mordaccissimas scripturas confectas, quin etiam impressas super eadem lite; Mr. Hodell translates: "the most bitter libels which were added to this same lawsuit." [7] venit excusandus; "comes to be excused." [8] aliqualiter.

AUTHORITIES

Cap. 1, de iis, etc., Decretal V, 10. The rubric is "mulier occidens sponte filium, debet perpetuo in monasterio poenitere," etc.

SECTION 17.

[ARCH., PAM. 1, XXI, 21, § NEC QUICQUAM FACIT.]

Nor does it make any difference that the accused numbered many causes of hatred not only against

Francesca, but also against her parents, because if they be carefully weighed, they all coincide and are brought back to the original cause, namely, that of "injured honor." However that may be, whenever there are causes that are compatible with one another,[1] the act that follows should be attributed to the more urgent and the stronger.[2] Rot. cor. san. mem. Alex VIII, dec. 168, n. 5; and on the point, that when many causes concur the homicide should be referred and attributed to the causa honoris, see Matthaeu de re crim. contro. 11, n. 38 and 39.

[1] inter se compatibiles; see Glossary, i.e., not inconsistent, so that the effect might be assigned to or caused by any one of them.
[2] pinguiori.

Section 18.

[Arch., Pam. 8, cxvii, 126, § Altera causa.]

Another cause [for the homicide of the Comparini] alleged by the Fisc, consists in the suit brought for the annulment[1] of the promise of dowry, upon which every most ingenious argument[2] was employed on the other side; and because of this it is alleged that Guido fell within the penalties of the Constitutions of Alexander and the Banns. But this allegation surely falls to the ground, for if we look into it carefully, we shall find without difficulty, that a cause of this kind is not less injurious[3] to one's honor; for the ground by means of which Pietro had tried to free himself from his obligation to furnish the promised dowry was simply[4] this, namely, that Francesca was not his daughter, but the child of an unknown father and a prostitute — but whether a disclosure of this

kind would wound the reputation of a nobleman any man will perceive.

[1] annullatione. [2] omnis solertissima indago; perhaps meaning sophistry. [3] offensivum. [4] unica.

This section is repeated post Ch. X, sec. 26.

Section 19.

[Arch., Pam. 8, cxviii, 126, § Ultrumque fit.]

Whether or not an allegation of this kind could perhaps have deserved some consideration before (as I have said above) the confessions of Count Guido and his companions were obtained — for then the Fisc might be doubtful from what cause Guido could have been led to kill [Pompilia and the others] — yet, after it is clear from the confessions of all of them that the causa honoris had provided him with the impulse and compelled him to kill, as Count Guido asserts, page 678, reverse, where we read: "To inflict wounds upon them inasmuch as they had injured my honor which is the chief thing," in vain is the question asked whether he killed them for any other reason; wherefore since it is clear that it was the causa honoris, the Fisc will never be able to prove that they were killed ex causa litis and not ex causa honoris; as is indispensably required in order that the penalty of the aforesaid Bull should be incurred, as is said on this point by Mandos. cons. 61, n. 1 to 3; Rota coram Puteo dec. 97 and 98, book 1.

This section is repeated in the argument as to torture, Ch. V, sec. 24, and as to aggravating circumstances, Ch. X, sec. 27, where the notes may be found.

THE ARGUMENT FOR THE FISC

1. The defense of causa honoris, even if available for Guido in Pompilia's case, does not extend to that of Pietro and Violante, because the special rights of a husband against the wife, are not to be extended against others, but are construed strictly. Section 20

2. The other causes for Guido's resentment towards the Comparini do not excuse him from the death penalty for their premeditated homicides. The law prohibits private vengeance. 21

3. There is no proof of their complicity in Pompilia's elopement, etc. Had there been, the Abate Paolo would not have consented, as he did, that Pompilia should be committed to their custody; and it is very probable that Guido himself knew of her commitment to them. 22

4. And the provisions of Pietro's will, written in 1695, show that he would not have connived in her dishonor. 24

5. The willingness of Violante to admit Guido when he pretended to deliver a letter from Caponsacchi was natural, as Violante was grateful to him for the aid which he had rendered to Pompilia. 25

Section 20.

[Gambi, Pam. 5, lxvi, 70, § Sed cessare videtur.]

But all dispute seems to cease[1] since it appears, from the record of the prosecution,[2] that the said Franceschini approached the said house of the Comparini, together with the men whom he had assembled, not only with the purpose and intention of killing his wife Francesca, but also of killing Pietro and Violante, whom, as he himself confesses, he was pursuing[3] with vehement hatred, on account of the suit that they had brought, and because [as he alleges] the couple had urged Francesca[4] to contrive death by poison for her husband and brother-in-law; and also because they were keeping his wife in their home, so that his honor was further wounded through the continuation of the adultery; — [all dispute ceases I say] because (in addition to what we said above that Francesca was placed in their said home by the authority of the Judge with the consent of her husband's own brother[5]), the question does not arise, whether it is permitted by law to kill the relations, friends and household[6] of an adulterous wife, even if the husband has suspected them[7] of affording their permission or assent[8] to his wife's adultery, since the individual rights and privileges granted to a husband against the wife, are not to be multiplied and extended, but strictly construed;[9] cap. Non potest de praebendis in 6 [Sexti Decretal. III, Tit. IV, cap. 21], cap. Fin. de fil. praesbyt. eod. lib. [Sexti Decretal. I. Tit. XI, cap. 2] which holds good not only when the question concerns the prejudice of a third person, but also if the question concerns the sole prejudice of the Fisc,[10] according to the Text l. 1 at the end, ff. de Jur. Immun.

[Dig. 50, 6], and that in a case exactly like ours[11] no extension [of the privilege] should be made from one person to another, appears from Covar. de spons. p. 2, cap. 7, § 7, and from Angel. in verbo Chi hai adulterato, n. 64, and it was so held by Antonius de Ball. tract. variar. lib. 3, de litt. dispens. cas. 1, n. 63 and 64. Yet we can more truly declare that such an assertion, made by Franceschini [of the plots of the Comparini against him], was solicited [from Francesca] by trickery,[12] since at the moment of death the said Francesca bore witness at the risk of her soul's damnation that she had not offended against the honor of her husband, which declaration is the more worthy of belief[13] since the dying are not presumed to be unmindful of their eternal salvation, according to the Text in l. fin. C. ad l. Jul. repetund. [Codex 9, 27, 6]; cap. Sancimus, 2, qu. 2. [Decretum Part 2, caus. 2, qu. 7, cap. 26].

[1] cessare videtur disceptatio; seems to disappear. [2] ex processu. [3] prosequebatur; perhaps in the sense of "suing." [4] instarent apud Franciscam. [5] fratris germani; full brother. Cf. frater (soror) consobrinus, § Quemadmodum, XXIX, 30, Ch. VIII, sec. 37. [6] domesticos, Mr. Hodell translates "servants." Cf. § Ad quid autem, XX, 21, ante sec. 6. [7] etiamsi maritus illos suspectos habaeret de permissione; habere used as auxiliary. [8] de permissione vel assensu praestito uxori adulterium committenti. [9] Mr. Hodell translates: "since the special rights and privileges conceded to the husband should not be multiplied against the wife and be given greater scope, but rather should be strictly interpreted." But the meaning is that these special rights should not be exercised by the husband against other persons than the wife. [10] The word "Fisci" is misprinted "Eisci" in the text of the O. Y. B. Mr. Hodell translates: "concerning one's sole prejudice." [11] in praecisis notris terminis. [12] quamvis nos verius affirmare possimus hujusmodi assertionem dicti Franceschini esse calumniose mendicatum. The reference is to Pompilia's letter to the Abate Paolo, LV, 56, referred to so often in the arguments, in which she tells of the plots and instigations of her parents. Mr. Hodell translates: "such an assertion of adultery on the part of Franceschini is calumniously

false." Mendicare, to obtain by beggary, from which mendicatum, bearing a resemblance to mendacium or something of the sort. [13] venit credendum, like an auxiliary.

AUTHORITIES

Angel. de maleficiis, Che me hai, etc., n. 64, "Non est mirum quod lex specialiter demonstrat solummodo personam mariti, ergo alteri demandari sive demitti non potest." Covar, de spons, 2, 7, § 7 in n. 5, supports the text as to extension of privilege to strangers. The references to the Sext. are not important.

The question of the efficacy of dying declarations is argued at length by Bottini in §§ Omnemque, LXXV, 82, Ch. VI, sec. 99 et seq., and especially § Exceptio vero, CLXVI, 174, Ch. VI, sec. 105. The text l. Sancimus, Cod. ad l. Jul. repetund. (Codex 9, 27, 6) is repeated in the Decretum as cap. Sancimus, but concerns statements under oath, not dying declarations, especially.

SECTION 21.

[GAMBI, PAM. 5, LXVII, 71, § CAETERAE VERO CAUSAE.]

The other causes which are adduced by Franceschini himself are enough indeed, assuming them to be true,[1] to show the hatred and enmity existing between him and the Comparini couple,[2] and so to prove that he had a motive for their premeditated[3] destruction, but not sufficient to excuse him from the ordinary penalty of death, which a premeditated homicide absolutely demands, according to the Texts in l. 3, § Patiatur. Cod. de Episc. Aud. [Codex 1, 4] and in § Lex Cornelia instit. de Public. Judic. [Inst. 4, 18, 5] and in l. poen., § Quia alias personas ff. ad l. Pomp. de Parricid. [Dig. 48, 9, 9] and in l. ejusdem in fin. ff. ad leg. Corn. de Sycar. [Dig. 48, 8, 3, 5] and Genesis cap. 9, vers. 6,[4] and Exodus cap. 21,[5] and Deuteron. cap. 19, vers. 13,[6] in accordance with which laws the same thing is affirmed by Godofred. Abavo in prax. Criminal., § homicida, n. 4, and 5; Giurb. cons. crimin. 2, n. 38 and cons. 63, n. 2; Clar. [book, 5, § Fin.] qu. 30,

vers. Punctus est [n. 12]; Farinac. qu. 119, n. 12 et seq.; for this reason, because the laws prohibit vengeance, that is, that private vengeance which persons who are not in public office[7] usurp to themselves, on account of their private hatreds, in killing men or otherwise injuring them, as is held in leg. 14, Cod. de Judic. [Codex 3, 1, 14], l. 38, § 8 ff. leg. Jul. de Adulter. [Dig. 48, 5, 39 (38), 8, § Imperatores], with other laws cited by my master Raynaldus, cap. 7, in Rubrica n. 122 and 123, where in n. 24 [124] he adds that in premeditated[8] homicide, the ordinary penalty should be inflicted, not only upon the slayer himself, but also upon all others who assist him by giving their aid, and assemble with him to commit the homicide with their aid, help, or counsel, [as appears] from Clarus, § homicidium, vers. Aut vero sunt plures; Farinac. qu. 96, n. 38 et seq.; cons. 138, n. 27; Cabal. resol. crim. 192, n. 1 et seq.

[1] quatenus verae essent. [2] dd. Jugales. [3] praemeditatum, generally appensatum in O. Y. B. [4] Genesis, ch. 9, verse 6: "Whoso sheddeth man's blood, by man shall his blood be shed." [5] Exodus, ch. 21 [vers. 12]: "He that smiteth a man, so that he die, shall be surely put to death." [6] Deut., ch. 19, verse 13: "Thine eye shall not pity him," etc. [7] carentes publico ministerio. [8] homicidio appensato.

AUTHORITIES

Giurba, Clarus, and Farinacius, as cited are not specially important. Raynaldus Observ. cap. 7, Rubric. 124, quotes the authorities.

SECTION 22.

[BOTTINI, PAM. 13, CLXXXV, 190, § SED UTCUNQUE]

But however there might be excused the barbarous slaughter wreaked upon this most wretched wife while she remained under the protection of the Judge,[1] at the suit and accusation[2] of her

husband, certainly the murder of Pietro and Violante ought to be considered utterly inexcusable,[3] although in his confession Guido made believe[4] to apply to them also the "causa honoris," on account of their alleged complicity, not only in advising the elopement of his wife, but also in her asserted infidelity. No proof, however, of this mitigating circumstance can be brought forward, nor does even the slightest shadow of it appear from the Prosecution for Elopement. And it is disclosed to be entirely improbable, or rather incredible, from the single consideration that the Abate Franceschini, the brother of the accused and the confessed defendant, would by no means have consented that Guido's wife should be committed to the custody of her parents, if he had had any, or even the slightest, suspicion of their complicity, since he was so vehemently striving[5] for the restoration of Guido's honor. And this consent, plainly [appearing] in the pamphlet written in Italian "for an account of the facts,"[6] although over eagerly denied[7] by the Procurator of the Poor, is admitted by his own remarkable frankness in denying merely that this consent had come to the knowledge of the husband, or in arguing that only presumptive knowledge could be alleged by the Fisc.

[1] in the preceding sections of this argument Bottini argued that this circumstance constituted the offense of laesa majestas. [2] viro instante ac illam deferente, Mr. Hodell translates: "at the instance and delivery of her husband." [3] inexcusabilis. [4] affectaverit; feigned. [5] anhelabat, panting for. [6] in scriptura Italico idiomate pro notitia facti exarata, Mr. Hodell translates: "an instrument prepared in the statement of fact in the Italian language." This is Pamphlet 10 of the O. Y. B. "Notizie di fatto." It seems extraordinary to us that such use could be made of statements contained in a mere pamphlet account of the case. [7] nimis animose negatus.

Section 23.

[Bottini, Pam. 13, clxxxvi, 191, § Quae tamen ultra.]

And what is still more, Guido's knowledge is extremely probable and deduced from a violent presumption, since it is more than likely that he should have been informed by his brother of his wife's departure from the monastery and of her establishment[1] in the said home, together with the obligation undertaken by her parents to provide for her maintenance,[2] and especially of the discovery of her pregnancy;[3] as is laid down by Gratian. discept. for. cap. 796, n. 28; Cravett. consil. 123, n. 1 and 2; Rot. decis. 341, n. 6, part. 11 recent. But in the present case the question is not as to proof of the husband's knowledge, but as to inferring from the said consent [of the Abate] a presumption that excludes the alleged complicity[4] of Pietro and Violante in the wife's infidelity — which has in no way been proved.

[1] collocatione in domo. [2] alimenta subministrandi. [3] praegnantia. [4] exclusiva complicitatis.

Authorities

Gratianus, Discept. 796, n. 28: an account was rendered to the brother of a party to the suit, and it was said that the latter must be presumed to have been informed of it, by reason of their relationship, residence together, and intimacy. Cravetta, cons. 123, n. 1 and 2; knowledge is presumed among those who dwell together. Rotae Recent. dec. 341, n. 6, part 11; knowledge is inferred from blood relationship of the parties.

Section 24.

[Bottini, Pam. 13, clxxxvi, 191, § Tantumque abest.]

And so far is this complicity from being proved in respect to Pietro, that the contrary is clearly evident from his will written in the year 1695, after

suit had been begun about the fictitious parentage of Pompilia;[1] in which will, notwithstanding this litigation, he made his wife Violante heir of the usufruct in the first place, and after her death Francesca Pompilia, upon condition of her residing in the City and living honorably, as appears from the extract[2] of the said will given in our present Summary, Number 5. And in this he also asserts that she had so far behaved herself honorably, and declares that on account of her good character he leaves her the legacy of the usufruct. Therefore it is shown to be utterly incredible that he while living should have been willing to conspire for her dishonor, from which in the event of his death he also shrank,[3] in that he deprived her of the usufruct bequeathed to her in case she should lead a dishonest life, and exhorted her, in case of the dissolution of her marriage, to assume a religious habit,[4] a fat legacy having been left to her also for that purpose.[5]

[1] super suppositione partus: see note § Credidit infelix, XIX, 20, ante sec. 4. [2] particula; Mr. Hodell translates: "details." [3] a qua mortus abhorruit; the will going into effect at his death, and speaking from that time. [4] i.e., to become a nun. Mr. Hodell translates: "to assume a religious dress." [5] relicto ad hunc effectum pingui legato.

Pietro's will, CLVI, 160, was made long before Pompilia ran off with Caponsacchi.

Bottini's argument in this section does not seem very strong.

Section 25.

[Bottini, Pam. 13, CLXXXVI, 191, § Praetensae vero.]

Nor indeed can any presumption of the alleged complicity[1] be supplied by the consideration that when Guido pretended to deliver a letter, sent by the Canon, the doors were immediately opened by

Violante to the assassins, from which ready credulity my friends the counsel for the defense try to argue that the name of the lover was not offensive to Violante, and so neither was his intimacy[2] with Francesca Pompilia. But seeing that the Canon was the author of her liberation from the peril of death by bringing her from her husband's house to her father's home,[3] without regard to his own danger, it ought not to seem wonderful, that Violante should retain some mark of a grateful spirit for the kindness that he had bestowed upon her daughter, and open the door. Nor can[4] there be inferred therefrom her consent to Pompilia's infidelity, from which their past acquaintance[5] had been free, and much more is this so, at a time in which he[6] was absent and banished[7] in Civita Vecchia.

[1] complicitatis. [2] conversatio. [3] ad Patrios lares. [4] valet. [5] correspondentia. [6] ipse. [7] relegatus.

In connection with this division of the argument, which concerns the homicide of Pietro and Violante, should be read those sections that here follow in the text; viz.: § Vera igitur causa, CLXXXVII, 192, Ch. X, sec. 72; and § Pro cujus, CLXXXVII, 192, Ch. X, sec. 73, the translation of which is included in the argument of the Fisc based on the aggravating circumstance of the violation of the Bull of Alexander VI.

CHAPTER X

THE ARGUMENTS AS TO THE AGGRAVATING CIRCUMSTANCES OF THE CRIME

THE ARGUMENT FOR THE DEFENSE

The argument for Guido in answer to the argument of the Fisc, based on the alleged aggravating circumstances, viz.:

I. The conventicle or assembly of armed men, contrary to the Banns of the Governor, ch. 82, and the 75th Constitution of Sextus V.

II. The carrying of such arms as are prohibited by the Constitution of Alexander VIII, and the Banns, ch. 8.

III. The fact that the homicides were committed ex causa litis, Guido being a party to the lawsuits pending between him and the Comparini, contrary to the Constitution of Alexander VI.

IV. The fact that Pompilia was slain in the home of the Comparini, assigned to her as a prison, with the consent of Guido's brother, so that she was in the custody of the law.

The general answer is that while these circumstances might somewhat increase the punishment, they cannot raise it to the extreme penalty of death, the reason being that the just resentment, caused by injury to his honor, excuses Guido to that extent. Section 1

And in detail:

I. As to the conventicle or assembly of armed men: — Section

a. The penalties for conventicle do not apply because Guido assembled the men in order to restore his reputation. 3

b. The authorities cited to the contrary relate to vengeance for a personal injury, but not for wounded honor. 6

c. The conventicle or assembly being made for a lawful purpose, which purpose was accomplished, the conventicle was lawful according to the decisions of the Rota. 7

d. The conventicle is only unlawful when made for an indeterminate evil end, which evil is not effected; for the Banns impose a penalty in such a case, but lay down no rule when the crime is consummated. The authorities considered. 10

II. The offense of carrying arms prohibited by the Constitution of Alexander VIII, and the Banns of the Governor, is merged with the crime committed with them.

a. This is shown by the authorities. 14

b. When several crimes are committed at the same time and for the same purpose, only a single penalty is imposed, for the crime principally intended. 17

c. This is so, although the Banns, ch. 8, apparently direct that the penalties shall not be merged. 18

d. The crime committed does not derive its importance from the character of the weapons employed. Section 19

e. And in fact Guido denied that he used, carried, or kept arms of the prohibited measure; that he held a short knife is not legally proved. He had indeed a horse-pistol, which is permitted, which he carried for self-defense, and which he had reason to believe might be needed. 20

f. And further, as Guido did not commit the homicides with the arms in question, his carrying the same should not be punished with death. 23

g. Finally, Guido did not incur the penalty for carrying prohibited arms from the mere fact that he stood by when his associates committed the homicides with them. 24

III. Answer to the argument that the homicides were committed ex causa litis contrary to the Constitution of Alexander VI.

a. In reference to the suit brought by the Comparini, based on Pompilia's fictitious parentage, to recover the dowry, the Constitution does not apply.

1. Because the lawsuit itself was an injury to honor, and because fresh provocation had been given by the Comparini which caused Guido's just resentment. 25

2. Because whenever two causes exist, the causa honoris is regarded as the more important. 29

b. In reference to the suit brought by Pompilia for divorce, the same arguments apply, and in addition: Section

1. If the Alexandrine Constitution applied in such case any wife might commit adultery, and then by merely bringing a suit for divorce, escape punishment at her husband's hands. 30

2. The divorce suit was a nullity, the summons having been served merely on the Abate Paolo, who was not so authorized by his power of attorney. 31

IV. The answer to the argument that Pompilia was slain in the home of the Comparini, assigned to her as a prison, so that she was in the custody of the law.

a. Pompilia had been merely placed in the home of the Comparini assigned as a prison, under bond not to leave it. This is not "public custody." 32

b. The consent of Guido's brother, or even of Guido himself, does not affect the question. 34

c. Guido's action was not taken to show disregard of the law, but to avenge his honor. 35

d. The rule does not apply even in case of an actual prison, or in the stronger case of a church, when provocation is given, as here. 36

e. The same arguments apply also to the case of Violante, the custodian. 41

Section 1.

[Spreti, Pam. 9, cxxxiv, 140, § Agnoscit fiscus.]

The Fisc acknowledges the relevancy of the foregoing,[1] therefore he recurs to the circumstances attending the crime, namely, the assembly of armed men, the lawsuit that was going on[2] between Count Guido and the Comparini, the aggravating circumstance of prohibited arms, and finally the place where the crime was committed, that is, because Francesca Pompilia was detained in the house where she was killed as in place of a prison. But the answer is easy, because circumstances of this kind can, it is true, somewhat[3] increase the penalty of the principal crime,[4] but by no means raise it to the highest point in such a way that Count Guido and his associates should be punished[5] with the extreme penalty [of death]. We find it so decided in similar cases:[6] [first] Muta dec. Sicilae 61, especially at the end: "A report[7] of the case therefore having been made in the General Visitation[8] in March 1617, before his Excellency, because there appeared the wicked method of killing her, she having been thus called by his son and afterwards her corpse was discovered just as though the dogs had devoured it outside the walls, Leonardus himself was sentenced to the royal galleys for seven years." [See secondly] Sanfelicius in said dec. 337, n. 13, where he says: "And although some of them were sentenced to relegation, this was, as a matter of fact,[9] on account of the mutilation of the private parts of the victims, for which crime the Fisc kept urging they should be punished with the penalty of the Lex Cornelia de Sicariis." [And thirdly] Matthaeu de re Crimin. contro. 11, n. 46: [where

it is said] "But the matter having been more maturely considered[10] in the Aula, it was adjudged that the husband had conducted himself too treacherously in feigning absence, in taking his brother with him, and in killing with prohibited arms, because a crime is rendered insidious with us merely by the use of firearms.[11] And so it was decided that on account of this excess the husband should be sentenced to the punishment of exile for four years, and to pay two thousand ducats, etc., which sentence was affirmed on appeal."[12] And contro. 12, under n. 29, where we read: "And it was thus decided in the case presented[13] in condemning Franciscus Palomeque[14] to the punishment of the galleys for ten years, etc., on account of the aggravating circumstance of firearms[11] increasing the punishment. Antonius Alvarez was sentenced to the like punishment, who had killed his wife deliberately,[15] because she led an evil life. His punishment was increased for this reason, that he was adjudged to have been derelict[16] because he was not complaining of mere adultery, but of her living as a prostitute, which she could not have done without the indifference or the connivance of her husband."

[1] relevantiam praedictorum; i.e., the general defense of the causa honoris. [2] litem vertentem. [3] aliqualiter. [4] exasperare poenam delicti Principalis; Mr. Hodell translates: "increase the penalty of the principal in the crime." [5] veniant puniendi; veniant as auxiliary. [6] sic decisum in terminis. [7] facta relatione; see Glossary. Relatio means generally the report or opinion in a case decided by the court, or sometimes in a case referred to the Judge by the Sovereign. [8] in visita generali; Mr. Hodell translates: "A decision was therefore made in view of the case in general." The visita generalis seems to have been almost equivalent to our General Jail Delivery; at stated times those charged with the oversight of the prisons made their examinations. See Scanarolus passim; Lunadoro, Relatione della Corte, etc., p. 65. [9] de facto; cf. § Nec verum. vers. Dexar. decis., XXVIII, 29, Ch. VIII, sec. 33.

[10] re maturius in Aula perpensa. [11] armorum igneorum. [12] in gradu supplicationis; supplicatio was equivalent to appellatio, see Matthaeu et Sanz, Contro. 18, n. 20. [13] decisum in specie proposita; Mr. Hodell translates: "in the face of the facts proposed." See Glossary, facti species, facti series. [14] Franciscum Palomeque, not Palomi as Mr. Hodell gives the name. Palomeque was the man who killed his wife in circumstances very similar to those of Guido's case. [15] appensate; the case of Antonio Alvarez is mentioned in connection with the principal case of Palomeque. [16] omissus Judicatus fuit; or, remiss. Mr. Hodell translates: "because he was judged to have omitted this earlier."

AUTHORITIES

Sanfelicius, dec. 337; the case of the young Neapolitan noblemen cited previously in § Nec verum, XXVI, 28, Ch. VIII, sec. 12 and sec. 33 and elsewhere. Matthaeu et Sanz, cont. 11, the case of Joannes Vecino; contro. 12, the case of Franciscus Palomeque; see Appendix 3. Muta, dec. 61; this case occurred in 1616. The defendant, Leonardus, killed his wife, Chorinthia (who was clearly guilty), but he did not kill her immediately. According to the crabbed text of Muta, "Leonardus vir non sic interfecerit incontinenti, sed eam vocari fecerit per cuius (eius?) filium cõẽ (probably for coire) extra moenia civitatis Cataniae." * * "Facta ergo relatione in visita generali mense Martii 1617 coram Excellentia Sua ex quo visus fuit malus modus eam occidendi, sic vocata per filium, et postea eius cadaver quasi repertum fuit, quod canes comedebant extra dicta moenia, fuit ipse Leonardus condemnatus super regiis triremibus per annos septem." It was therefore the treacherous manner of the homicide and the inhuman abandonment of the body that decided the case against Leonardus. Whether "per filium" means "her son" or "his son" or "their son" is not clear. Browning, R. and B. VII, 813, says "*her* son." See this case cited in § Nec verum, vers. Novar. XXVIII, 29, Ch. VIII, sec. 31, and § Et tantum, CXXXII, 139, Ch. VIII, sec. 55.

SECTION 2.

[SPRETI, PAM. 16, CCXXIX, 231, § SICUTI AUTEM.]

But just as the causa honoris relieves Count Guido from the ordinary penalty of homicide, so it ought to relieve him from certain other ordinary penalties,[1] enacted in the Banns and Apostolic Constitutions against those bearing prohibited arms or committing other crimes; for I have said, and I repeat, that the just resentment which excuses him from the one crime should also excuse

him from the others, since this reason always and everywhere sustains him, that he was not of sound mind[2] according to what was maintained at large in our argument from § Agnoscit Fiscus [CXXXIV, 140, ante sec. 1] to § Quo vero ad litem [CXXXVII, 143].[3]

[1] poenis ordinariis. [2] in plenitudine intellectus. [3] i.e., up to and including § Adeo ut qui, CXXXVII, 142, Ch. VIII, sec. 9.

Section 3.

[ARCH., PAM. 3, XLIV, 44, § NEC IN HOC CASU.]

Nor in this case can the penalty for the asserted conventicle be applied[1] with respect to Count Guido, since the cause for which he assembled the men assists[2] him to escape the penalty, since one may lawfully call his friends and companions together in order to restore his own reputation. Marsil. in l. 1, n. 13, C. de Rapt. Virgin. [Codex 9, 13]; Paris. cons. 154, n. 7, and n. 15, p. 4; Farinac. qu. 121, n. 87; Baiard. ad Clar., § Homicidium, n. 195, 196, 197, vers. Et etiam potest alios congregare, and others above cited.

[1] tractari. [2] suffragatur.

AUTHORITIES

Baiardus ad Clarum says if the socii are hired, they and the mandant are punished more heavily. Parisius, part 4, cons. 154, n. 16, and Farinacius, qu. 121, n. 87, have been cited before on the general proposition.

This section is repeated under Torture, Ch. V, sec. 7.

Section 4.

[ARCH., PAM. 3, XLV, 44, § QUOD COMPROBATUR.]

And this is well established, for whenever[1] any one moved by just resentment calls men together to avenge his injury, he does not incur the crime

and penalty of conventicle; Corn. cons. 216, n. 3, vers. Quinimo si multi, lib. 3.

[1] quoties.

AUTHORITIES

Corneus, cons. 216, n. 3, hardly bears out the proposition: "Si multi attinentes audiunt suum attinentum interfectum vel vulneratum, et concurrant causa faciendi vindictam, non dicentur fecisse conventiculam communi usu loquendi, qui est in huiusmodi attendendus."

SECTION 5.

[ARCH., PAM. 8, CXIX, 127, § ET QUOD CONGREGATIO.]

And that the assembling of men for the purpose[1] of recovering one's reputation does not fall under the penalties of the Apostolic Constitutions, see [consilium] included in[2] Farinac. cons. 65, n. 66.

[1] ad effectum. [2] penes.

AUTHORITIES

The reference, Farinacius, cons. 65, is to a responsum of counsel whose name is not given, annexed to that of Farinacius, holding that the Bull of Sextus V does not apply in case of the defense of one's dignity (reputation) because the Bull is contrary to common law (i.e., makes a change in it) and is not to be extended, its purpose being to prohibit the recovery or retention of one's possessions by means of an armed band.

SECTION 6.

[ARCH., PAM. 3, XLV, 44, § ET LICET FARINACIUS.]

And although Farinacius qu. 113, n. 155 declares that this holds good if vengeance be done immediately, but otherwise if it be after an interval, I beg you to observe that whatever might be the law if the question concerned vengeance for a personal injury[1] (which is the case[2] of which he speaks), yet when the question concerns an injury that wounds the honor, vengeance taken at any time is said to be taken immediately; not only because the injury is always urgent and pressing,

but also because it should be called the restoration and reparation of honor, which otherwise he who is injured in reputation could not accomplish, rather than vengeance and revenge,[3] as we believe we have more than satisfactorily proved[4] in our other argument in behalf of Guido.

[1] injuriae personalis, see note § Similiter nil, vers. Sanfelic. dicta., XVII, 17, Ch. VIII, sec. 40. Mr. Hodell translates: "in either case if it concerns vengeance for a personal injury." [2] in quibus terminis. [3] ultio et vindicta; a pleonasm. [4] satius satisfactum esse.

AUTHORITIES

Farinacius, qu. 113, n. 115, refers to the case where one is killed or wounded and his friends take vengeance after an interval, in which case he thinks that the law of conventicle applies. This was a personal injury because inflicted on the person.

SECTION 7.

[ARCH., PAM. 3, XLV, 44, § SED CESSAT OMNIS.]

But all difficulty entirely ceases[1] for this reason: [granting that] perhaps prosecution could be brought for conventicle, if the men had been assembled for an evil purpose,[2] and no other crime had followed[3] therefrom, yet when they had been called together according to the reasoning of the Fisc,[4] to commit the homicides, and these have been committed, the question concerns the prohibited conventicle no longer, but [only] the homicides, because the assembling of the men tended to the same purpose,[5] according to the authoritative opinion[6] of Seraphinus, dec. 61, n. 4 and 7, and another opinion there of Blanchettus,[7] n. 19 and 22, after the consilium of Farinacius, book 2, where very many authorities are collected.

[1] cessat. [2] ad malum finem. [3] sequutum. [4] juxta sensum Fisci. [5] effectum. [6] magistrale votum; see Glossary. [7] error for Oranus.

AUTHORITIES

The opinions cited are those of the Sacred Rota in 1592 collected by Farinacius under dec. 61. Cardinal Seraphinus says, n. 4, that if any one collects his following and sends them to a certain place where their acts tend to the same effect, he shall only be punished for one offense, which doctrine he says seems to be decisive of the case. And in n. 7: "Hence I infer in the case laid before me, since all the preparations tended to the end that those men should be recaptured who were taken away, but not for a conventicle of armed men against the Prince or the Commonwealth * * it does not fall under the Constitution of Sextus V, but under other laws and Constitutions."

The opinions of Card. Blanchettus and Oranus are added; the latter of whom (not Blanchettus) said: "Although Antonius broke jail by the aid of armed men, whom he had called together, and rescued those therein detained, and ordered the Governor of the place to be killed, he cannot be said to have incurred any other penalty than that of jail-breaking and rescue or homicide * * since one penalty is merged with the others, because as I have said his collecting armed men was done for the liberation of the prisoners and committing homicide upon the author of their imprisonment."

Seraphinus Olivarius Razzalius was Auditor, 1565-1609, and Dean of the Rota, 1590. Laurentius Blanchettus was Auditor of the Rota, 1572-1612. Franciscus Oranus was Auditor of the Rota, 1581-1599.

SECTION 8.

[ARCH., PAM. 3, XLV, 44, § EA POTISSIMUM.]

And this is especially so for this reason, because where the beginning and the end [of an act] are unlawful, the end is regarded, and not the beginning, as Bartolus teaches; Bartol. viden.[1] in l. quod ait lex, § quod ait, n. 3 [4] ff. ad leg. Jul de Adult. [Dig. 48, 5, 24, 4]; Alex. cons. 75, n. 6, lib. 3; Marsil. in pract. § quoniam, n. 91; Boss. in pract. tit. de favor. defens. n. 7.

[1] viden; I suppose, videndus, to be seen.

AUTHORITIES

Bartolus supports the text. Bossius, de favoribus defensionis, n. 7: "Add also, in favor of the defendant, that if the beginning of his act is lawful, and the end unlawful, or vice versa, we regard that which is lawful, whether it be in the beginning or the end," citing Bartolus as above. Alexander, cons. 75, n. 6, book 3, also quotes Bartolus, giving as a reason that when both acts are unlawful the defendant should not be punished for both, but only for the final act.

Section 9.

[Arch., Pam. 3, xlv, 44, § Additur quod hominum.]

I add, that the assembling of men is not of itself illegal; on the contrary it may sometimes be lawful and approved, as in the cases reported by Farinacius qu. 113, n. 150, 153, 156, but [it is prohibited] on account of its evil consequences, and the wicked purpose for which it is generally done. Hence, since the assembling of men is prohibited, not on its own account, but for something else, the end should be considered rather than those things which precede it; Seraphin. in said decision 61, n. 7.

Authorities

The authorities are cited in the preceding sections.

Section 10.

[Arch., Pam. 8, cxviii, 126, § Qualis poena ultimi.]

Such capital punishment could the less be inflicted upon Guido under the pretext that he had assembled armed men contrary to the form[1] of the Apostolic Constitutions and Banns, for when[2] the question for debate also becomes[3]: Whether a husband may lawfully assemble men to kill his adulterous wife? we should then[4] be beyond the conditions[5] of the Constitutions which apply whenever men are assembled for an indefinite evil purpose,[6] and no evil has resulted; for then the provisions of the Bulls are applicable. But whenever men are united to commit crimes, then these results having followed, the end for which the men had been assembled is regarded, and its punishment is pronounced, nor is there any further inquiry as to its beginning, that is, the conventicle,[7]

as I have proved in my other argument.[8] And I add another opinion of Oranus, included among the decisions after the second volume of the Consilia of Farinacius vot. 61, n. 20, and the Addendum thereto, Letter A at the end, where after a discussion of the question [the editor] asserts: "But, certainly, notwithstanding what has been said above, I do not believe in the present case, that there should be any departure from the opinion of so many men, who we should believe have considered the whole case with deliberation and wisdom, and have so advised our most Sacred Lord Clement VIII." And at the end of this addition he avers that it was thus decided in the Apostolic Chamber by order[9] of the said Supreme Pontiff. Bartol. in l. nunquam plura, n. 10, ff. de Privat. delict. [Dig. 47, 1, 2].

[1] contra formam, as in English. [2] quando etiam. [3] controverteretur. [4] adhuc. [5] extra terminos; see Glossary. [6] ad indeterminatum malum; contrasted with delicta following. [7] Here Archangeli uses the technical term conventicula instead of congregatio, etc. [8] in Pamphlet 3, XLV, 44, § Sed cessat omnis, etc., ante sec. 7. [9] de ordine; see Glossary. The meaning is that the decision of the case was submitted by order of the Pope.

AUTHORITIES

The quotation in the text is from the notes of the editor. The citation from Bartolus in l. nunquam plura is "Siquis coadunaverit gentem et miserit illam ad aliquem locum, certe cum isti actus tendant ad eundem effectum, non punietur nisi ex uno;" apparently added by Archangeli as an after-thought.

This decision of the Rota is dated Feb. 17, 1592. On Jan. 3, 1596, the question was submitted to the Camera Apostolica by order of the Pope and their opinion was rendered to him who acted accordingly. See § Et ratio est, sec. 12, post.

SECTION 11.

[ARCH., PAM. 8, CXIX, 127, § QUOD ETIAM REMANET.]

And this is also clearly proved[1] by the Banns of our Most Illustrious Lord, cap. 82, where they

impose a penalty for assembling for an evil purpose, if that wicked purpose be not accomplished,[2] and lay down no rule where the crime for which the men have been assembled has been consummated, because in that case the penalties for conventicle cease,[3] and only the penalty for the crime that has been perpetrated is inflicted, as was said above.

[1] remanet comprobatum; like an auxiliary, "has been and is;" see Glossary. [2] sequutus non sit. [3] cessant; see Glossary, "do not apply." See as to the Banns, § Prima etiam, LXIV, 68, post sec. 49.

Section 12.

[Spreti, Pam. 9, cxxxv, 141, § Et ratio est.]

And the reason is manifest, because it cannot be denied that Count Guido and his associates committed all the aforesaid crimes from the same causa honoris; wherefore just as that is considered sufficient for escaping the ordinary penalty for homicide, — as to which see the whole title of the Digest and Codex ad leg. Cornel. de Sicariis, — so likewise[1] it should be considered sufficient for avoiding whatever other penalties are enacted in the Apostolic Constitutions against those committing the other crimes expressed therein; for attention is always given to the chief purpose of the offender; l. si quis nec Causam ff. si certum petatur;[2] whose intention it also is that always distinguishes his crimes;[3] l. verum est [Dig. 47, 2, 25] and l. qui injuriae ff. de furt. [Dig. 47, 2, 54]. On this point[4] — to the effect,[5] namely, of avoiding the penalty established in the 75th constitution of Sextus V of sacred memory, Bullar. nov. Tom. 2, page 468, against those who assemble armed men, whenever it appears that they had been assembled

for the purpose[5] of committing some other crime, for instance, breaking open a prison and freeing the prisoners therein, — three very distinguished Auditors of the Sacred Rota, namely Coccinus, Blanchettus, and Oranus, so decided, whose opinions have been printed[6] among the decisions collected by Farinacius after his consilia, vol. 2, dec. 61, and in the Additions at the end thereof it is affirmed that it had been so determined in the full camera, before which by order of Clement VIII of sacred memory the case had been proposed for decision and examined.

[1] pariformiter. [2] an erroneous reference, the title Si certum petatur is Cod. 4, 2. [3] cuius etiam animus semper distinguit malefica [maleficia]. [4] in puncto. [5] ad effectum; effectus meaning either purpose or effect. The crime committed in this decision was that of jailbreaking. [6] impressa; Mr. Hodell translates, "included."

AUTHORITIES

This decision of the Rota in 1592 is cited also by Archangeli, § Sed cessat omnis, XLV, 44, ante sec. 7, and § Qualis poena, CXVIII, 126, ante sec. 10. Coccinus here is apparently a mistake for Seraphinus. Joannes Baptista Coccinus was Auditor of the Rota from March 13, 1600, to his death, Jan. 13, 1641. According to Farinacius the case was referred to the Apostolic Camera by the Pope. See § Qualis poena, ante sec. 10. The 75th Const. of Sextus V, A.D. 1588, here cited from 2 Bull Nov. 468, may also be found in 2 Mag. Bull. Rom. 623. See note to Bottini's argument, § In primis, CXCVIII, 202, post sec. 50.

SECTION 13.

[SPRETI, PAM. 9, CXXXV, 141, § NON REFRAGANTE.]

It does not break the force[1] of this that subsequently[2] Spada in cons. 25 [n. 39], lib. 1, should have written to the contrary in taking the side of the Fisc, of which he was Advocate, because his opinion was expressly[3] refuted and rejected with the weightiest reasons and arguments by Vermigl. cons. 356 throughout, and by D. Raynaldus

Observ. par. 3, cap. 25, § 4 from n. 9, as far as n. 33; and before them the same view was also taken by an anonymous Doctor in Farinac. cons. 65 from n. 68 to n. 141, and by Farinacius himself, qu. 113, n. 60; Guazzin. de confisc. ampliat. 86, conclus. 13, n. 3.

[1] non refragante. [2] post modum; i.e., after the decision of the Auditors of the Rota cited in the preceding sections, Spada took a different view. Mr. Hodell attributes Spada's opinion to Farinacius. [3] ex professo.

AUTHORITIES

Vermigliolus, cons. 356, an elaborate criticism and refutation of Spada's views. Sebastianus Guazzinus Amp. 86 of conclus. 13, n. 3, supports the text. Raynaldus Observ. cap. 25, § 4, n. 8 and 9: "I ask in the second place what is the penalty for taking possession by one's own authority with a band of armed men? I answer that then the 75th Bull of Sextus V applies, which prohibits the collection of bands of horsemen (cavalcatas), etc., for recovering, acquiring, or retaining possession of lands and their boundaries and limits, Farinac., qu. 113, n. 151. But it should be noted concerning this said Bull that the anonymous writer in Farinacius, cons. 65, from n. 68 to n. 141, and Farinacius himself in the Addition to qu. 113, n. 160, show that the aforesaid Bull is restricted to the case only of acquiring, retaining, or recovering possession, and he says at the end of said consilium that it was so decided by Clement VIII and this is also affirmed by Guazzinus, de bon. confisc. ampl. 86, conclus. 13, n. 3, who in n. 5, from Farinacius, cons. 65, n. 51 and 66, says that the aforesaid Bull does not apply when the question concerns the acquiring, retaining, or recovering possession of movables; but see in general Jo. Bap. Spada among the consilia of Farinacius, cons. 229, book 3, printed in book 1 of Spada's consilia, cons. 25, where he explains the Bull at length." Joannes Baptista Spada was Advocate of the Apostolic Fisc, and considered an authority.

SECTION 14.

[SPRETI, PAM. 3, XXXIX, 37, § NEQUE VERO.[1]]

Nor indeed can the punishment in a case like this be increased on account of the alleged carrying of prohibited arms, because the latter offense is merged with the crime; Baldus in l. adversus in fine C. de furt. [Cod. 6, 2, 4]; Jas. in l. quod dicitur

n. 3, ff. de verb. oblig. [Dig. 45, 1, 86]; Marsil. in l. si in rixa n. 15, ff. ad l. Corn. de Sicar. [Dig. 48, 8, 17]; and cons. 51, n. 51 [57], vers. Cum ergo ista portatio armorum; Cephal. cons. 204, n. 42 et seq. vol. 2; Farinac. qu. 108, n. 166; Guazzin. defens. 26 [29], cap. 2, n. 18; where [it is thus held] even if a greater penalty was imposed for the carrying of arms [than for the other crime]; and so whenever it is evident that the crime was committed with cause, and from just resentment, as in the present case, the carrying of arms becomes unpunishable,[2] or at least is not to be punished with a greater penalty than that which should be imposed[3] for the [principal] crime itself; just as it is well shown, concerning arms which are considered treacherous[4] according to the Banns, by Police. de Reg. Aud. tom. 2, tit. 10, cap. 4, n. 11, pag. 25.

[1] referred to by Spreti, § Et in terminis, CXXXV, 141, post sec. 16.
[2] impunibilis. [3] venit apponenda. [4] proditoriis.
See this section repeated in the argument pro Sociis, Ch. XI, sec. 22.

AUTHORITIES

De Marsiliis, cons. 51, n. 57, is as cited. Cephalus, cons. 204, n. 42: the defendant shot a man with a short arquebus, a "rota," forbidden by statute under penalty of the galleys. Cephalus argued that he should be punished only for the assault. Guazzinus, defens. 29, cap. 2, n. 18, follows Cephalus; the carrying of an arquebus is merged with the infliction of wounds, and should only be punished with respect to them, since the arquebus was carried for that purpose, and therefore the punishment cannot be inflicted for carrying arms because it would be greater for carrying arms that for the wounding. Cephalus adds that if the wounding did not follow, then the mere carrying of the aequebus would be punishable with the penalty provided by the statute and banns. Guazzinus notes that this opinion is contrary to that of Baiardus. Farinacius, qu. 113, n. 166, also agreeing with Cephalus, says that the rule of merger applies when one carries arms for the purpose of wounding; but if he has not this purpose, and afterwards wounds, he is punishable for each offense; also, that where the punishment for wounding is greater than that for carrying arms, the lesser penalty is merged with the greater; but that, according to the opinion of Decianus, it is otherwise if the penalty for carrying arms is greater than that for

the wounding, Decianus in this differing from Cephalus. Both Guazzinus and Farinacius observe that by the terms of the general Banns of the Ecclesiastical State in the year 1599, ch. 24, the penalty for carrying arms is not to be merged with the penalty for the crime committed therewith. I cannot find these Bannimenta, but similar ones are quoted by Bassanus, Lib. 3, cap. 7, n. 195, 262, and 295, who also in n. 278, etc., recites the Bulls of Pius IV, Pius V, and Alexander VIII. An edict of the Governor, dated 1690, enforcing these Bulls, may be found in Martinus, Additio ad Praxem, 320.

Section 15.

[Arch., Pam. 8, cxix, 127, § Remanet tandem.]

There remains finally the carrying of prohibited arms. And even if some authorities have maintained that this is not to be merged with the principal crime, yet the contrary opinion is held by the majority of the authorities,[1] because the end is regarded which the offender had principally in mind, as in our exact case[2] is held by Bartol. in l. nunquam plura n. 7, and the Addendum thereto litt. C. ff. de privat. delict. [Dig. 47, 1, 2], and on that passage Angel. n. 8, with the Adden. litt. B. after the middle; Bald. in l. Adversus n. 7, C. de furtis [Codex 6, 2, 4]; Andreas Barbatia de Cardinalibus legatis a latere, 5 quaest. n. 26; Marsil. in l. si in rixa, n. 5 ff. ad leg. Cornel. de Sicar. [Dig. 48, 8, 17], and in l. unica n. 54, Cod. de rapt. Virgin. [Codex 9, 13, 1]; and in Prax. Crim., § Pro complemento n. 38; and very many authorities afterwards, Jodoc. in Pract. crim. cap. 74, n. 4; Andreas de Iserniensis in Constit. si quis aliquem de Percuss. illicit. cum Armis at the end, beginning of vers. Sed prima opinio videtur verior; Viv. comm. opin. verb. Statutum puniens; Bertazzol. cons. criminal. 520, n. 1; Cephal. cons. 204, n. 42, et seq., lib. 2; Farinac. qu. 22, n. 20; and on the point that one killing causa honoris with prohibited arms is

still to be punished more mildly, Matthaeu testifies that it has been so adjudged, de re crim. contro. 11, n. 46 and 47.

[1] sententia crebriori Doctorum calculo. [2] in nostris praecisis terminis. See as to the Bulls, note to sec. 60.

AUTHORITIES

Bertazzolius, cons. 502, n. 1, seems to hold that where a statute imposes a fine of a hundred pieces for carrying arms, and a hundred for attacking a man, and a hundred for wounding him, if any one attacks another with arms and wounds him, the assailant is held only for the penalty of the hundred pieces, since the penalties are merged. This view, however, must be qualified by a comparison with what is said by the editor of Bertazzolius, his son Claudius, in a note to cons. 205, which is referred to by Guazzinus in the passage cited by Spreti, § Neque vero, XXXIX, just preceding. Claudius says that his father when Praetor imposed both penalties where a statute imposed one fine for merely drawing a sword, and another for inflicting a wound.

Farinacius, qu. 22, n. 20, puts the case as in Bertazzolius, cons. 520, with the variation that he supposes the three penalties to be imposed by different statutes. He also refers, n. 21, to a case where one statute imposed a double penalty for offenses committed at night, and another imposed a double penalty for offenses committed in the public square; a man who committed an offense at night in the public square, although he violated both statutes, yet suffered only one duplication of the penalty.

Vivius, Communes Opiniones, Statutum puniens, is not important. Jodocus (Damhouderius) in his Praxis, c. 77, n. 4, upholds the theory of merger in a case involving three statutes, as stated by Farinacius. Joost de Damhouder was born in Bruges in 1507, was for thirty years in the service of Charles V and Philip II, was Prefect of Flanders, and died in 1581. His Praxis was long the guide of tribunals in the Netherlands and Germany, and highly regarded elsewhere. It was first published in 1554, the edition of 1601 is generally cited, while the Antwerp edition of 1570 is illustrated with about seventy vigorous and interesting woodcuts of crimes and their punishments. See a specimen in David Murray's Lawyers' Merriments, p. 96, from the Frankfort edition of 1565, not so good, however, as that in the Latin ed. of 1570. Dr. Murray gives a bibliography on p. 216. See also Esmein, History of Continental Legal Procedure, p. 156, and H. C. Lea, Superstition and Force, 524. Von Bar's criticism of Damhouderius as superficial and commonplace would appear too severe; it is certainly not the general opinion. Judge Wessels, a very competent critic, in his History of the Roman-Dutch Law, praises the Praxis as scientific, thorough, and masterly. Von Bar's statement, on the authority of August Orts, that Damhouderius plagiarized from Philip Wielant, I have not been able to verify. It seems strange that such a discovery should only be made as late as 1872.

Section 16.

[Spreti, Pam. 9, cxxxv, 141, § Et in terminis.]

And in such a case as this for the purpose[1] of avoiding the penalty of the Banns or the Apostolic Constitutions prohibiting the carrying of arms, I have cited many authorities in my previous argument, § Neque vero [xxxix, 37, ante sec. 14] and especially Polic. de Reg. Aud. Tom. 2, Tit. 10, cap. 6, n. 8 et seq., who examines the subject at large; my colleague the Procurator of the Poor collects others in his present argument, § Remanet tandem [cxix, 127, ante sec. 15], to which I now add: Caball. resol. crim. cons. 62 throughout; Matthaeu de crimin. contro. 11, n. 46 and the sections following; contro. 12 under n. 29; Capyc. latr. dec. 78, n. 7, verb. Discusso tamen negotio, where [he says that this is] because a preparatory act is merged with the intended deed,[2] and he affirms that it had been so decided by the Sacred Council of Naples,[3] and the sections following [of Capycius Latro].

[1] ad effectum; purpose or effect. [2] actus praeparatorius confunditur cum praeparato. [3] Sac. Cons. Neap.

Authorities

Caballus, cons. 62, adds nothing, as it applies to cases of self-defense, etc., when the laws against carrying weapons do not apply. The cases from Matthaeu are those of Joannes Vecino and Franciscus Palomeque, so often referred to. The case of Capycius Latro dec. 77, was decided on appeal in the Sacred Council in 1635. The author says that it had often been held by this tribunal that the carrying of arms was merged in the crime itself.

Section 17.

[Arch., Pam. 8, cxx, 127, § Quod etiam procedit.]

And this even holds good in the stronger case of several crimes which can readily be committed

separately and which tend to a different end. Nevertheless if they are committed at the same time, and for the same end, only the single penalty is imposed for the principal crime that was in mind. Thus, if one intending to commit theft climbs over the city walls, although he could have committed the crime of theft without the crime of climbing over the walls, which is a very grave offense, Farinac. qu. 20, n. 146, yet he is punished only with the single penalty, namely, that for theft, as that was the crime principally had in mind, rendered a little harsher on account of his climbing over the city walls, yet not of the greatest severity. Joseph. Ludovic. decis. Lucens. 61, n. 3, vers. Si vero forent.; Farinac. qu. 22, n. 25.

AUTHORITIES

Climbing over the city wall was a serious matter. Farinacius, qu. 20, n. 146, says that he who enters or leaves a city not by the gate, but over the wall, is punished with death. He says that such should be called thieves and robbers; he might have quoted John x, 1: "He that entereth not by the door into the sheepfold, but climbeth up some other way, the same is a thief and a robber."

And in qu. 22, n. 25 (which follows the previous citation of this questio in § Remanet tandem, CXIX, 127, ante sec. 15): "And so in the case cited by Alexander de Nevo and Rosellus, although the defendants might have committed the theft without climbing over the walls of the city, nevertheless only a single penalty will be imposed in that case, namely, that for theft, which was the principal crime in the mind of the offenders, to be increased, however, by reason of their climbing over the city walls according to what I have said above in qu. 20, n. 146, just as in the case in Josephus Ludovicus, dec. Lucens. 61, where stuprum might have been committed without breaking the door, yet only the single penalty should be imposed, namely, that for stuprum, which was the principal crime, but to be increased likewise on account of breaking the door." The opinion of Ludovicus, which is quite elaborate, was approved by the Senate. See this case, referred to in note to § Si ergo, LXV, 69, post sec. 61. Mr. Hodell's translation of this passage seems erroneous; the punishment for theft was not greater than that for climbing over the walls, but the reverse.

Section 18.

[Arch., Pam. 8, cxx, 128, § Non me latet.]

Nor does it escape me, that the Banns of our most illustrious Lord [Governor], cap. 8, may seem to put an end to the question by providing that the penalty for carrying arms ought not to be merged with the penalty for the crime committed with them; but — besides this, that the Banns do not include the case of some of the associates, they being foreigners and not of the district[1] — since, however, they receive a passive interpretation by the common law,[2] whenever[3] arms are not carried for an evil end, and afterwards some crime is committed with them, then because the delinquent did not have in mind the crime which he perpetrated, he is punished with respect to both, because he committed different crimes at different times. But whenever any one carries prohibited arms with the intention of killing and thereafter kills, then the principal crime of homicide, in contemplation of which he carried the arms, is regarded, and the penalty for homicide is imposed, but not that for carrying arms, as Joanness de Platea proves in making this distinction[4] in § Item lex Julia l. 2 in fine vers. Sed quaero an si aliquis; Instit. de public. Judic.

[1] aliquem ex Sociis uti forenses; for aliquos? as in § Non loquar, cxxii, 129, Ch. XI, sec. 25, Dominicus and Franciscus are spoken of as foreigners. [2] passivum interpretationem a Jure communi; i.e., a strict construction, the common law being followed except so far as it is expressly changed by the statute. See Glossary. [3] quoties. [4] in puncto sic distinguendo.

Authorities

Joannes de Platea, Commentaries on the Institutes. This reference is difficult to locate but appears to be De Publicis Judiciis, n. 105, which supports the text, citing Jacobus de Belvisio and Bartolus. The argument is answered by Bottini, Pam. 13, § Praeparatio pariter, cxc, 195, post sec. 64.

Section 19.

[Arch., Pam. cxx, 128, § Supplico adverti.]

I pray you to observe that the crime, as to which we argue, is rendered important[1] because three persons, who were fearing no harm (but who should have feared harm from every quarter) were killed, and not because of the kind of arms with which they were killed. And so it was their number, and not the instrument of their death that has aroused astonishment, and it would certainly,[2] have been the same if they had been slain with the longest of swords,[3] or with staves, or with stones. Wherefore it would seem very hard that the Fisc should glow with indignation[4] at these homicides, and, not being able to exact the death penalty for them, should exact it for the carrying of arms.

[1] redditur considerabile. [2] pro certo. [3] because it was the short or small weapons, easily concealed, that were prohibited. [4] excandescat; "get hot about it."

Section 20.

[Arch., Pam. 8, cxxi, 128, § Praeterea D. Guido.]

Besides this, Count Guido expressly denies that he had used, carried or kept arms of the prohibited measure, and although it is asserted by his four companions that he had in his hands at the time of the homicides a short knife,[1] and had given the same kind of arms to his companions, yet these companions[2] cannot convict him to the ordinary punishment, as is affirmed after a discussion of the subject, and a confutation of the contrary opinion, by Farinac. qu. 43, n. 76, together with n. 69 et seq; Guazzin. defens. 32, cap. 8, n. 5 versic. Quae opiniones, throughout; Angel. de confess. lib. 3, qu. 19, n. 14.

[1] brevem cultrum. [2] that is, the confessions of his companions or accomplices. The subject of inculpation by such confessions is treated elsewhere in § Socii et comites, XXII, 22, Ch. VIII, sec. 68.

AUTHORITIES

Guazzinus, defens. 32, ch. 8, n. 5: "If indeed there were three or more associates in the crime, not even these are enough for full proof for condemnation, * * although others affirm the contrary, that two or three associates deposing under torture are sufficient for full proof against the person named. But these contrary opinions can be reconciled if, together with the assertion of two or three associates, other proofs or corroborations concur; then they are sufficient for condemnation against the person accused." He cites Farinacius, qu. 43, n. 39, who gives a lengthy and not very clear discussion of the subject.

Franciscus de Angelis, book 3, qu. 19, n. 14, cites and follows the authority of Guazzinus and Farinacius. Sebastianus Guazzinus, a native of Umbria, lived in the beginning of the 17th century. He was an Advocate in Rome, an Auditor Camerae, and Locumtenens in Criminalibus. His tractatus ad Defensam is a very practical and complete treatise, in addition to which he published a Tractatus de Confiscatione Bonorum, and another de Treuga et Pace.

SECTION 21.

[ARCH., PAM. 8, CXXI, 129, § NON NEGAT PENES.]

He does not deny that he had in his possession a horse-pistol[1] completely loaded,[2] but he did not use it[3] for killing nor was he carrying it for that purpose, but only for self-defense in case[4] he had found in the aforesaid house strangers ready to use violence against him. And this was permitted to him, as full privilege for carrying this kind of arms exists throughout the Ecclesiastical State, and I could boldly add even in the City, because no mention is made of the City [in the Banns?] although some places are excepted; according to that most true axiom that the exception confirms the rule in what is not excepted;[5] Alex. cons. 64, n. 2, lib. 4; Surd. cons. 430, n. 7, lib. 3; Gratian. discept. forens. cap. 922, n. 31.

[1] terzarolum; means literally the third part of anything, especially an arquebus one third the usual size. Hoare Ital. Dict., Terzarolo

or Terzaruolo, a short kind of arquebus. Mr. Hodell translates "dagger." Martinus in Praxis Criminalis 66, uses the word terzette. [2] undique honustum; see Glossary. Mr. Hodell translates: "entirely lawful." [3] non adhibuit; Mr. Hodell translates: "did not have it with him;" how then did he have it "on his person?" [4] quoties. [5] exceptio firmat regulam in non exceptis.

AUTHORITIES

Surdus, cons. 430, n. 7: "Exceptio confirmat regulam in casibus non exceptis, et declarat quid veniat sub regula." Gratianus, discept. for. ch. 922, n. 31, gives this variation, "exceptio firmat dispositionem in non exceptis declarando quid in ea veniat." The citation from Alexander is not important.

"The exception proves the rule:" this familiar maxim is often misunderstood to mean that a case not falling under the rule at all somehow "proves" it. Of course it means that where the rule itself contains exceptions, the fact that exceptions are thus made to its operation approves or confirms or emphasizes the application of the rule to all other cases.

SECTION 22.

[ARCH., PAM. 8, CXXI, 129, § IDQUE FACILIUS SIBI.]

And he could the more readily believe that this was lawful for him, because he had enemies in the City who were threatening him here, and were laying plots against him, as Guido says himself; and therefore it was more necessary to carry arms like these[1] here than elsewhere.

[1] necessaria delatio similium armorum.

SECTION 23.

[ARCH., PAM. 8, CXXI, 129, § NEC RELEVAT QUOD.]

Nor is it relevant that because[1] it is alleged he had killed with forethought,[2] the privilege of carrying [this kind of] arms should not be accorded him,[3] for — besides what has been said above and in my other argument, viz.: that the aforesaid homicides, the causa honoris existing, cannot be said to have been committed after an interval — the objection[4]

might hold good in case[5] he had used the said arms for killing, but as they were not so used, it does not seem possible to say that the right to carry them should not be accorded him.[3] At any rate,[6] even if by the greatest strictness of speech he might be said to have committed the homicides when armed with the arms referred to, yet he should not be punished with the rigorous penalty of death. Caball. resol. crim. cas. 90, n. 7, says on this point, "Nevertheless I have never as a matter of fact[7] seen the said death sentence executed in these cases, but it has been commuted to a milder sentence as a matter of grace."

[1] ex quo. [2] appensate. [3] suffragari. [4] objectum. [5] quoties. [6] in omnem casum. [7] de facto.

AUTHORITIES

Archangeli quotes here from Caballus, cas. 90, who adds, speaking of the punishment, "and generally a sentence to the galleys is imposed, perpetual, or for a time, according to the discretion of the Prince on consideration of the rank of the persons and the nature of the deed." He nevertheless had previously stated his inclination that the stricter view would be technically more correct.

SECTION 24.

[ARCH., PAM. 8, CXXII, 129, § DEMUM NEC.]

Finally [Guido cannot be said to have incurred the penalty for prohibited arms] from the fact[1] that he stood by[2] when the homicides were committed by his associates with such arms; because a penalty of this kind, which applies to the one using the said arms,[3] does not extend to his associates and assistants,[4] see on this point Merlin. Pignatell. cont. forens. cap. 47, n. 21, cent. 1.

[1] nec ex quo. [2] astitit. [3] locum habet in adhibente dd. arma; Mr. Hodell translates adhibente as "furnishing." [4] assistentes; or bystanders.

AUTHORITIES

Merlinus Pignatellus, contro. forens. cent. 1, ch. 47, n. 21: "It is true that the former words of our Pragmatic, quelle persone, che commettono simili delitti, considered simpliciter and by themselves are applicable as well to the principal in the crime as to him who gives aid, but the words following, con le dette scopette, explain the former and restrict them, so that they should be understood of him only who commits crime with these arms."

SECTION 25.

[SPRETI, PAM. 2, XXXIII, 33, § ABSQUE EO QUOD.]

And this is true,[1] notwithstanding that the Fisc may allege that the penalty imposed by the Constitution of Alexander[2] has been incurred, because the crime in the present case cannot be said to have been committed on account of hatred arising from the lawsuit, in which Count Guido recovered a favorable[3] judgment from Thomatus,[4] Auditor of the Camera, which was also registered[5] by the Supreme Tribunal of the Signatura Justitiae;[6] but the crime was caused rather by his just resentment arising from the disgrace, resulting to him from the aforesaid fictitious parentage of Pompilia,[7] and also by the provocation given by the said Comparini (who were killed), by means of[8] their publication[9] and circulation of the pamphlets and their aforesaid conspiracy in the elopement of his wife; since, as you know,[10] the said Constitution does not apply where no malice[11] intervenes, but where [on the contrary] some provocation has been given by the person injured, as is very broadly stated by Farinacius, cons. 67 throughout, where at the end he puts the decision of the Sacred Rota in full.

[1] referring to the preceding § Addito insuper, XXXIII, 32, Ch. IX, sec. 16, as to the just resentment of Guido by reason of the lawsuit of the Comparini. [2] See § Accedit ad exasperandum, LXXVIII,

85, post sec. 65. [3] favorabilem. [4] alluded to in § De causa, CLXI, 167, post sec. 67. R. P. D. Dominicus Thomatus is frequently mentioned by name in the Collectio Bullarum Innocent XII (Rome 1697) as A. C. Locumtenens, see Bulls 64 and 65, A. C. meaning Auditor Camerae. Mr. Hodell, O. Y. B. note 262, refers to him as Judge A. C. Tommati. [5] canonizatum. [6] a Supremo Tribunale Signaturae Justitiae. [7] partus suppositione, child substitution, see § Credidit infelix, XIX, 20, Ch. IX, sec. 4. [8] mediante. [9] evulgatione. [10] scilicet. [11] dolus; criminal intent.

See as to the Signatura Justitiae ante Ch. III. A month was allowed in the Signatura, before the sententia passed in judicatum, Recent. Decis. Part 9, tom. 2, dec. 399, n. 5, and was appealable when canonized, Recent. Decis. Part 11, dec, 246, n. 2. An appeal was allowed from a decree in petitorio, Recent. Decis. Part 16, dec. 156, n. 8 and 9.

The will of Pietro says "che verte avanti monsignor Ill. Tomati per l'atti dell' Olivieri," which Mr. Hodell translates "a lawsuit is going on which was brought by the Olivieri." Oliverius appears to have been an officer, perhaps notary, of the Signatura about this time, see Vitale, De Jure Signaturae, and probably l'atti dell' Oliviri refers to his record therein. See § Tantumque, Ch. IX, sec. 24.

AUTHORITIES

Farinacius in cons. 67 argues that to bring a case within the Alexandrine Bull three things are necessary in conjunction; first, that malice (dolus) must be present in the attack, or in the threats or insults; second, that the said attack or the insults should proceed from the lawsuits as a cause; third, that no provocation should have intervened on the part of the injured or insulted person; and the opinion of Blanchettus in the Rota in 1581 is given in extenso. In the actual case in cons. 67, one of the litigants met the other going into Church and asked him, "Where are you going?" The defendant answered, "To say my prayers and thank God I am not a prisoner;" to which the reply was: "When I shall put you there you will not come out." Whereupon a fight occurred. The first requisite would appear to be lacking here, as the quarrel seems to have arisen on a sudden; and certainly the third, because provocation was given.

SECTION 26.

[ARCH., PAM. 8, CXVII, 126, § ALTERA CAUSA.]

Another cause [for the homicide of the Comparini] alleged by the Fisc, consists in the suit brought for the annulment[1] of the promise of dowry, upon which every most ingenious argument[2]

was employed on the other side; and because of this it is alleged that Guido fell within the penalties of the Constitutions of Alexander and the Banns. But this allegation surely falls to the ground, for if we look into it carefully, we shall find, without difficulty, that a causa of this kind is not less injurious[3] to one's honor; for the ground by means of which Pietro had tried to free himself from his obligation to furnish the promised dowry was simply[4] this, namely, that Francesca was not his daughter, but the child of an unknown father and a prostitute — but whether a disclosure of this kind would wound the reputation of a nobleman any man will perceive.

This section is repeated, Ch. IX, sec. 18, where the notes will be found.

Section 27.

[Arch., Pam. 8, cxviii, 126, § Utrumque sit.]

Whether or not an allegation of this kind could perhaps have deserved some consideration[1] before (as I have said above)[2] the confessions of Count Guido and his companions were obtained — for then the Fisc might be doubtful from what cause Guido could have been led to kill [Francesca and the others] — yet, after it is clear from the confessions of all of them that the causa honoris had provided him with the impulse, and compelled[3] him to kill, as Count Guido asserts, page 678, reverse, where we read: "To inflict wounds upon them inasmuch as they had injured my honor which is the chief thing;" in vain is the question asked whether he killed them for any other reason; wherefore, since it is clear that it was the causa honoris, the Fisc will never be able to prove that

they were killed ex causa litis[4] and not ex causa honoris, as is indispensably required in order that the penalty of the aforesaid Bull should be incurred, as is said on this point by Mandos. cons. 61, n. 1 to 3; Rota coram Puteo dec. 97 and 98, book 1 [dec. 102 and 103?].

[1] locum sibi vindicare poterat. [2] in the beginning of his argument, § Confessio D. Guido, CI, 109, etc., Ch. V, sec. 17. [3] dedisse impulsum et compulisse. [4] on account of the lawsuit.

This section is repeated in the argument as to torture, Ch. V, sec. 24, and as to Pietro and Violante, Ch. IX, sec. 19.

Section 28.

[Spreti, Pam. 9, cxxxvii, 143, § Quo vero ad litem.]

Then indeed as to the lawsuit which was going on[1] between Count Guido and the Comparini[2] concerning the fictitious parentage[3] [of Pompilia], besides what was said awhile ago, I pray again that it be observed that the Constitution of Alexander does not apply where some provocation has preceded from the person injured, as is well affirmed by Farinacius cons. 67 throughout, who follows a decision of the Rota, which he puts at the end of said consilium; and we have examined this previously[4] in our former argument, § Absque eo quod [xxxiii, 33, ante sec. 25]. And this provocation results in the present case from the injury which the said Comparini, while the lawsuit was pending, inflicted upon the said Count Guido through their complicity in the said elopement and the adultery committed by their daughter on that occasion.[5]

[1] vertebat. [2] illos de Comparinis. [3] super suppositione partus. [4] praeventive. [5] illius occasione.

Section 29.

[Spreti, Pam. 2, xxxiv, 33, § Et in omnem casum.]

And at any rate,[1] since two causes concurred with Count Guido for the commission of the crime; one indeed the lawsuit aforesaid, and the other the wounding of his honor because of the institution of the said lawsuit, and their conspiracy in the elopement, from which the adultery resulted, the causa honoris should be regarded which is the weightier and consequently more proportionate[2] also to the crime; Honded. cons. 105, n. 60, lib. 1; Vermigl. cons. 79, n. 15; Rot. Genuen. vot. 11, n. 5 and 6, post Censal. ad l. unic. C. Siquis Imper. maledixer. [Cod. 9, 7, 1] and Matthaeu in these circumstances very excellently, de re crim. cont. 11, n. 79 [39].

[1] in omnem casum. [2] proportionata.

Authorities

In Matthaeu cont. 11, the case of Joannes Vecino, Appendix 3, the husband had had some litigation with the adulterer, but it was adjudged that where two causes concur the weightier must be considered as the inducement to the act. Hondedeus, book 1, cons. 105, n. 60, and Vermigliolus, cons. 79, n. 15, support the text generally.

Section 30.

[Arch., Pam. 8, cxviii, 126, § Quae etiam aptantur.]

These remarks[1] apply also in respect to the homicide of Francesca who prosecuted a suit for divorce,[2] for if she had claimed to be separated for any other reason, and if her dishonor were not clear, then at least there might be room made for the Constitution of Alexander. But since wounded honor supplied the cause for the homicide we are

far removed from the terms of the Constitution of Alexander; otherwise a very pretty method would have been discovered for wives to play the prostitute with impunity. For if after they had committed adultery[3] they should institute a judicial action for separation,[4] they would find a safe refuge to escape the hands of their justly angered husbands,[5] and be rendered safe by the protecting shield of the said Bull, even though [the husbands] should be angered, not by reason of the attempted divorce, but by reason of their wives' infidelity.[6]

[1] The preceding sections of Archangeli's argument concerned the similar question raised concerning the homicide of Pietro and Violante, § Altera causa, CXVII, 126, and § Utrumque sit, CXVIII, 126, ante sec. 26 and sec. 27. [2] judicium divortii; i.e., for separation, see below. [3] post adulteria admissa; Mr. Hodell translates: "admitted." [4] judicium super separatione thori. [5] mariti juste iratas manus. [6] a difficult and obscure sentence. Perhaps offenderentur means that the wives should be cast in their suit, but then for earum we should read suarum.

This section is replied to by Bottini, § Alia quoque, CLXXXIII, 193, post sec. 74.

Section 31.

[Spreti, Pam. 9, CXXXVIII, 143, § Altera lis.]

The other lawsuit which is alleged to have been brought by Francesca Pompilia against Count Guido for divorce[1] might have been omitted, because, besides the observations made by my colleague the Procurator of the Poor in his present argument, § Quae etiam aptantur [CXVIII, 126], this suit was brought illegally,[2] the summons indeed having been, as I am informed,[3] served[4] merely upon the Abate Paolo, Count Guido's brother, who had no power of attorney for that, especially as it has not been proved that the said Count

Guido had any knowledge of the said suit having been brought, as it is now alleged.

[1] super divortio. [2] nulliter. [3] ut mihi supponitur. [4] exequuto monitorio; Mr. Hodell translates: "because the warning of it, as I suppose, had reached only Abate Paolo." The power of attorney, CLVIII, 162, seems to be full enough to authorize the Abate to accept service of a summons; the disputed point appears to be whether it justified service upon him.

Bottini replies to this section in § Alia quoque, CLXXXVIII, 193, post sec. 74.

Section 32.

[Arch., Pam. 1, xviii, 19, § Nec maeretur considerari.]

Nor does the qualifying circumstance that the place of the crime had been assigned as a prison deserve to be considered, as though the custody of the Sovereign[1] had been violated, because beside that [in the first place][2] he is not said to be "in custody" who is detained in a place under security that he will not leave it; Angel. in l. qui in carcerem ff. de eo quod met. caus. [Dig. 4, 2, 22]; Capyc. dec. 154, n. 4; Farinac. qu. 30, n. 58; and the Text is clear in l. succurritur at the end ff. ex quibus Caus. Major. [Dig. 4, 6, 9], where it is said, "Labeo however thinks that 'custody' is intended only as 'public custody',"[3] and the Gloss thereon in verb. Putat.

[1] Principis. [2] grammatically connected with the section following, § Objectum funditus, XVIII, 19, post sec. 38. [3] Custodiam autem solum publicam accipi Labeo putat.

Authorities

(Antonius) Capycius, dec. 154, n. 4; he who has given sureties and sworn not to leave a designated place, is neither in vinculis or in custodia.

So Farinacius, qu. 30, n. 58, who relies inter alia upon the authorities cited in the text, but the contrary view is also stated in his preceding n. 57.

SECTION 33.

[SPRETI, PAM. 2, XXXIV, 34, § FACILIUS IGITUR.]

This conclusion should then the more readily follow in our case, since the said Francesca was not living in a formal prison, but was keeping her home as a prison under bond of three hundred scudi not to leave it, for he who has given sureties and has sworn not to go away is neither in chains,[1] nor in custody; L. prima ff. de Custod. Reor. [Dig. 48, 3, 1]; Angel. in l. si quis in carcerem, n. 2, ff. quod met. Caus. [Dig. 4, 2, 22]; Luc. de Pen. in l. si quis Decurio, n. 16, Cod. de Decurionibus, lib. 10 [Cod. 10, 32, 55], where he says, that to be kept under guard in chains and to be committed to sureties are different things; Grammat. cons. 51, n. 8 and 9; Farinac. qu. 30, n. 58, where it is said that the word "custody" is to be more strictly interpreted than the word "chains," according to the Text in l. succurritur at the end, "Labeo however thinks that 'custody' is intended only as 'public custody';"[2] and Gloss on word Putat ff. ex quibus Caus. Majores, etc. [Dig. 4, 6, 9]; Cyrill. in Summ. Crimin. Rubr. 12, de Custod. Reor. § 1, n. § 1, vers. Vinculorum ergo appellatio latius accipitur.

[1] in vinculis. [2] Custodiam autem solum publicam accipi Labeo putat; the Gloss draws the distinction between the public "carcer" and "vincula privata."

SECTION 34.

[ARCH., PAM. 1, XVIII, 19, § PARUM ETIAM.]

It makes very little difference also, that Francesca was residing in the home of Violante, assigned to her as a safe prison, with the consent of Count

Guido's brother. For what difference would it make if she had been taken away from the monastery with the consent of Guido himself, of which we have not a word in the proceedings?[1] He could have dissembled this in order to have an opportunity for killing her[2] that his honor might be restored, nor would dissimulation of this kind have increased the crime, especially not to the degree of the ordinary penalty, since it is certain that he had the right to kill his wife, stained as she was with adultery, without incurring such penalty, although sometimes a heavier, sometimes a lighter penalty is inflicted, according as more or less treachery accompanies the deed, as Matthaeu declares was the practice in the Senate of Madrid,[3] Matthaeu de re crim. contro 12, n. 29 and 30.

[1] in processu. [2] ut aditum habere potuisset ad eam occidendam. [3] in Senatu Matritensi; Mr. Hodell translates: "in the senate of Matritensis." The Latin name of Madrid was Mantua Carpentanorum, subsequently Matritum. The case is that of Franciscus Palomeque, translated in Appendix 3.

Section 35.

[Arch., Pam. 8, cxv, 124, § Nec refert.]

Nor does it signify that Francesca at the time she was killed had given security to keep her home as a prison, as if she were living in the custody of the Sovereign,[1] seeing that, however it might be if the accused had killed Francesca in enmity to the Sovereign,[1] he nevertheless intended to recover his honor, and to wash away with her blood the unjust stain upon his reputation, and so for this special reason[2] the said alleged "custody" is not to be given attention, nor does it aggravate the

crimes; as, in the stronger case[3] of one injuring a man who had a safe conduct[4] from the Sovereign,[1] Farinacius affirms in making this distinction. Farinacius qu. 29, n. 18, and before him Mascard. de. probat. conclus. 162, n. 18 and 19, where it is said that knowledge is not presumed.

[1] principis. [2] ex causa particulari. [3] in fortiori casu. [4] salvum conductum.

AUTHORITIES

Mascardus, concl. 162, n. 18: "from what we have said it can be inferred that he who kills one under ban when the latter had a safe conduct, or if you prefer a public certificate (fidem publicam) is presumed not to have had knowledge of the safe conduct, whence he should not be punished, just as if the man whom he killed had not actually had a safe conduct. The reason is that in a case of doubt ignorance is presumed." Farinacius is to the same effect.

SECTION 36.

[SPRETI, PAM. 2, XXXIV, 33, § SIMILITER NEC AGGRAVARI.]

Likewise the penalty should not be increased by consideration of the place [of the crime] because the defense of honor is so just, and so just are the anger and mental agitation[1] arising therefrom, that reason cannot be expected of one [in such a case[2]] as is held by Merlin. Pignatellus controver. for. [Cent. 1]; cap. 66, n. 27 and 28, citing Joannes Francisc. del Carvillo [Castello], dec. 271, n. 51 and 55, who speaks of an insult offered[3] in prison. And in n. 29, he proves his conclusion from this; that greater reverence is due to churches and other places consecrated to God, and in which the King of Kings and Lord of Lords dwells in essence,[4] and nevertheless one who sins in them from just anger and resentment is excused, [Pignatellus] asserting that all the canonists upon cap. Fin. de Immunit.

Eccles. [Decretals, Book 3, Tit. 49, ch. 10] and others cited there by him unanimously acknowledge this.

[1] animi motus. [2] de eo non sit habenda ratio; perhaps "a reason for it cannot be had." [3] de insultu facto, may mean either insult or assault. [4] per essentiam.

Section 37.

[Spreti, Pam. 9, cxxxvi, 141, § Similiter ad effectum.]

Likewise for the purpose[1] of escaping the penalty appointed for those who kill one detained in prison, and thus living under the custody of the Sovereign,[2] we have cited many authorities in our past argument, § Similiter nec aggravari [xxxiv, 33, ante sec. 36] to which I now add, Prat. in addit. ad Paschal. de patr. potest, part 3, cap. 6, vers. Ex his quoque; D. Raynald. Observ. part 1, cap. 4, § 1 to 4, n. 65 et seq.; Mut. decis. Siciliae 36, at the end.

[1] ad effectum. [2] Principis.

Authorities

Raynaldus Obs. ch. 4, § § 1 to 4, n. 65, cites the other authorities here referred to and says: "Besides, although a homicide committed within a jail is said by everyone to be most serious, and flagrant, and truly is so because the sanctity of the place is violated, being the very Court, the ears of the Judge, and the majesty of the Prince itself, since the prisoners as I have said are under the security, protection and good faith of the Prince, * * nevertheless when a homicide is committed within a prison upon provocation and in a quarrel, the homicide has always been punished short of death."

Paschalis de Viribus Patriae potestatis, Part 3, ch. 6, ex his quoque; this is from the notes of Pratus, who says that the attributes of the place accentuate the crime, but not so much as to subject to capital punishment one who being unable to restrain his anger acts in defense of his honor. Marius Muta, dec. 36 (also cited by Archangeli in the next § Objectum, xviii, 19) shows that the penalty was mitigated in consideration of provocation.

Section 38.

[Arch., Pam. 1, xviii, 19, § Objectum funditus.]

And the objection[1] utterly falls, because the circumstance that the crime was committed in a place of this kind does not aggravate it whenever[2] it is committed by one under provocation, and to repel an injury, as it is held in the stronger case[3] of a crime committed within a prison. Mar. Mut. dec. 36, Ricc. dec. 245, part 3; Merlin. Pignatell. controv. Forens. 66, n. 28 and 29, Centur. prima.

[1] objectum. [2] quoties. [3] in fortioribus terminis. This section is grammatically connected with § Nec maeretur, ante sec. 32.

Authorities

Merlinus Pignatellus, Cent. 1, Cont. For. 66, n. 28 and 29, who cites the other authorities, refers to a very different case, that of a crime committed in a prison due to provocation arising therein, as in resentment of an insult, etc. So in Muta dec. Siciliae also cited by Archangeli, § Similiter ad effectum, cxxxvi, 141, preceding. Spreti in the section following makes the same reference to a quarrel in a church, but there also the case was where the defendant was calore iracundiae provocatus in rixa.

Section 39.

[Spreti, Pam. 9, cxxxvi, 142, § Nec quidquam facit.]

Nor does it make any difference that Policardus in the passage cited, and some other of the authorities recently cited, are speaking of homicide committed in a quarrel or for the defense of one's own life; for the attendant circumstance of a quarrel relieves the delinquent from the ordinary penalty of his crime only so far as it makes an excuse for him who, when provoked, intended to be avenged, as Ulpianus says in l. qui cum natu major. 14, § Idem puto ff. de Bon. libert. [Dig. 38, 2, 14, 6], and so far as one, who being at the time overcome[1]

by his just resentment, is not in the fullness of his intellect, as following Bald. in cap. 1 at the end de pace juram. firman. is held by Boss. tit. de homic. n. 60 at the end; Vermigl. cons. 26, n. 8.

[1] praeventus; hindered, prevented, hence overcome.

AUTHORITIES

Bossius de homicidio n. 60: a man under the impulse of intense resentment or fear is not in the fullness of his intellect. See § Et in his praecisis, CXXXVI, 142, Ch. VIII, sec. 5. So Vermigliolus cons. 26, n. 8. Policardus is cited in § Et in terminis, CXXXV, 141, with reference to the carrying of prohibited arms, ante sec. 16.

SECTION 40.

[SPRETI, PAM. 9, CXXXVI, 142, § UTRAQUE AUTEM.]

Both moreover of these reasons[1] without any doubt[2] support the case of a husband,[3] and of any other person who commits homicide from the causa honoris, according to what was proved in my former argument, § Hoc stante [XXV, 27, Ch. VIII, sec. 3] and the following section [§ Et ita conciliando, XXVI, 27, Ch. VIII, sec. 4] even if they do it after an interval, according to what is likewise brought forward in my former argument, § Nec verum est with many sections following [XXVI, 28, Ch. VIII, sec. 12].

[1] utraque ex his rationibus. [2] proculdubio. [3] militat in marito.

SECTION 41.

[ARCH., PAM. 8, CXVI, 124, § PRAETERQUAMQUOD.]

Furthermore, when we speak of "custody," we should understand "public custody," not a private house, as was proved in our other argument; nor is the answer sufficient that this might hold good as to the person himself under custody,[1] but not as to

the custodian[2] — Violante, — for I do not know how to discover any probable distinction between the two cases, since each concerns the avoidance of a penalty,[3] nor can any greater reason be found in one than for the other. Indeed a third party[4] is worthy of a greater excuse who breaks custody of this kind, knowledge not being proved that the person injured was living under such custody,[5] just as he is excused who kills a man under ban, not knowing of the removal of the ban;[6] Mascard. de prob. concl. 162, n. 27; Farinac. qu. 103, n. 123 [93].

[1] i.e., Pompilia. [2] de custodiam Violante; Cf. DuCange. An evident error. This may be for custode or custodia. [3] uterque agat de effugienda poena. [4] tertius, i.e., Guido, Pompilia, and Violante being the two others. Mr. Hodell translates: "a third case would be more worthy of excuse." [5] quod offensus sub tali custodia existeret: Mr. Hodell translates: "Because such an offense might arise under such custody." [6] ignorans rebannitionem; Mr. Hodell translates: "ignorant of that ban." The text is: "non probata scientia, quod offensus sub tali custodia existeret, quemadmodum excusavit occidens Bannitus ignorans rebannitionem." In the final clause we should read "excusatur occidens bannitum." The correct citation is from Farinacius, qu. 103, n. 93, which supports the text. Mascardus is cited, ante § Nec refert, sec. 35.

THE ARGUMENT FOR THE FISC, BASED UPON THE AGGRAVATING CIRCUMSTANCES

The authorities cited in excuse of Guido relate to the case of simple homicide, and not a case aggravated by qualifying attendant circumstances, any one of which is punishable with death. The punishment must be increased when the crime is greater. Section 42

I

The first aggravating circumstance is the unlawful assembly or conventicle of armed men.

a. The Banns of the Governor, cap. 82, punish with death and confiscation of goods him who assembles four or more armed men; and the 75th constitution of Sextus V, had previously raised this to the crime of rebellion. 49

b. The authorities, which hold that a husband may kill his adulterous wife by the aid of men thus assembled, relate to the case where the husband so kills his wife in the act, or in his own home, but not after an interval and not in his home. 51

c. It is clear that Guido's offense is punishable, even if not with death. If he assembled men to perpetrate this, the penalty of the Banns applies. 52

d. The only excuse for Guido could be his rash resentment, which could not be

Section

restrained, but this does not hold good where vengeance is taken after an interval with the help of armed men. 53

e. The reason of the Constitution and Banns would be vain, if the penalty should not be applied where the assembly is made in order to commit a crime. It applies even if the assembly is made for a lawful end. 56

f. The decision of the Rota holding that the assembly must be directed against the State does not apply, for in that case the provision of the Constitution would be superfluous which raised the offense to the crime of laesa majestas. 57

II

The second aggravating circumstance is the carrying arms contrary to the provisions of the Constitution of Alexander VIII, which prohibits not merely the carrying, but also the retention, manufacture, or introduction thereof into the City or Ecclesiastical State under any pretext whatever.

a. Here as the crime actually followed, the penalty for the graver offense applies. 58

b. And even where the homicide would otherwise be punished more mildly, its commission by means of prohibited arms is punishable with death. The bearing of the arms is not merged with the crime committed with them. The authorities cited to the contrary do not

apply as they relate to homicides committed in a quarrel or in self-defense, and do not arise under the Constitution but under other laws. Section 62

c. The Banns expressly say there shall be no merger. 64

III

a. The third aggravating circumstance is that the homicides were committed ex causa litis, on account of the lawsuit brought by the Comparini to rescind the dowry contract, which brings the case within the Constitution of Alexander VI. 65

b. The three essential facts required by this Constitution all appear in this case:

1. Craft or malice. The confessions of the defendant prove deliberation. 66

2. The existence of a lawsuit, in which an inchoate decree favorable to Guido had been entered by the Judge. 67

3. There was no fresh provocation given. And so far as the provocation was grounded on the alleged adultery, since this was introduced into the criminal prosecution, the Alexandrine Bull applies, for this includes criminal as well as civil cases. 68

c. 1. It is no answer that, as Guido had obtained a favorable decree in the lawsuit, he was led to commit the homicides by his resentment on account of Pompilia's fictitious birth, and the publication by the Comparini of scandalous pamphlets and their conspiracy in his wife's elopement. 70

Section

2. The victory in the lawsuit was only possessory, and the causa litis continued, and the other alleged causes were connected with it. The parents' conspiracy in the elopement and adultery was not proved. The only proof was derived from the alleged letter of Pompilia to the Abate Paolo which was rejected, and besides, this antedated the rescission of the dowry contract and could not therefore constitute fresh provocation. The true cause was the lawsuit and the pamphlets issued in connection with it, and this raises the crime to laesa majestas. 71

d. The suit brought by Pompilia for divorce also affords a causa litis.

1. It is no answer that it was a nullity because the service on the Abate Paolo was invalid. His power of attorney was sufficiently broad. 74

2. Nor is the argument valid that the application of the Constitution would enable an adulterous wife to escape by bringing suit for divorce. At most that would only be true if the wife brought the suit immediately, but here she did not begin the suit until after he had chosen to take legal vengeance, and prosecuted her criminally for adultery. 74

IV and V

The fourth and fifth aggravating circumstances are that the homicides were committed in the home of the Comparini, and that their home had been assigned to Pompilia as a prison.

IV

a. The fact that the homicides were committed in the home of the Comparini aggravates the crime, as everyone's home should be his safest refuge. Section 75

b. Especially as Guido entered with changed clothing so that the homicide was committed by stratagem. 76

c. And Guido entered in an insidious manner by pretending to deliver a letter from Caponsacchi. 77

V

a. The final aggravating circumstance is that the home of the Comparini had been assigned to Pompilia as her prison, so that she was in the custody of the law, and the violation thereof was laesa majestas. 78

b. The arguments on the other side refuted:

1. Guido must have known that his brother, the Abate, assented to the assignment of the house as a prison. 81

2. The authorities cited contra relate to the resenting of an injury inflicted in prison, in which case self-defense under provocation might excuse. 82

VI

It therefore follows that these homicides were committed with so many aggravating circumstances that they should be punished with the ordinary penalty. 84

Section 42.

[Gambi, Pam. 5, lxiv, 68, § Attamen in hac; and § Quia Doctores.]

But for all that, we believe that in the facts of this case of ours, we are concerned with something not involved in the difficulty of the question above presented; because the authorities above cited in support of the contrary opinion apply, and ought to be so understood, in cases whenever the question concerns a husband who kills his wife without exceeding his legal right, and with no concurrent circumstances and aggravating conditions, and moved only by his just resentment. But it is otherwise, when, as in our case, there are present a transgression of legal right, and a contempt for the law; and besides aggravating circumstances and conditions concur. That we should proceed, according to the common practice, with this distinction, is affirmed by Laurent. Matthaeu de re crim. contr. 12, n. 29. After he has declared that a husband is to be excused from the ordinary penalty and punished more mildly, he adds: "From these authorities the common practice is that the effect of the resentment should be considered and only the excess punished, so that if there is a suspicion of craft in the manner of killing, as for example a circumstance tending to show treachery, the punishment is increased."

This section is repeated from Ch. VIII, sec. 74, where the notes may be found.

Section 43.

[Gambi, Pam. 5, lxiv, 68, § Circumstantiae vero.]

The aggravating circumstances which concur in our case are many, and so serious that any one of

them[1] is sufficient for the imposition of the penalty of death and for aggravating the grade of the crime.[2]

[1] quaelibet ex ipsis. [2] ad reddendum crimen qualificatum.

Section 43 (continued)

[Bottini, Pam. 6, lxxvi, 83, § Caeterum quatenus.]

Besides, assuming that the accused might also have conceived some suspicion of his wife's infidelity that could have provoked his just anger, both from the said elopement of his wife and from the letters which were found as is alleged,— and their verbal sense seems to present that of a lover — yet by no means does this render excusable such ferocious vengeance taken after so long an interval of time, and that not merely upon his most wretched wife herself, but upon her parents, who were entirely off their guard, and deserved no such fate, and with such weighty attendant circumstances, increasing the grade of the crime, so that he would have to be punished with the extreme penalty, if that defense should be admitted. For although just resentment, because of the violation of conjugal fidelity, usually moderates the punishment for a husband who kills his adulterous wife, [yet it is not so here] for the argument cannot any longer be made for total immunity after the opportunity has been lost by the husband for vindicating his own honor by the death of the adulterer, as is advised by Felin. in cap. Si vero [vere], n. 3, de sentent. excommunicat. [Decretal V, 39, 34]; Imola in l. quid ergo, § si haeres, n. 4, ff. de legat. [Digest 30, 53, 3]; Mantic. cons. 241, n. 18 at the end, book 1; Oldendorp. var. lect. ad Jur. Civil. interpretat. lib. de usucap. tit. de adult. n. 1, at the end,

page 295; Baccon. ad Trevul. vol. 2, disp. 32, thes. 6, Litt. C. vers. Idem conceditur, page 1277; Cassad. Rittesch. ad Novell. [Conradus Rittershusius Expositio in Novellas] Justinian., par. 12, cap. 5, n. 8, page 677; Matthias. Stephan. ad Novell. 177, n. 20 [117, n. 368, etc.], page 609. But yet, in order to escape or moderate the penalty of the Leg. Cornelia de Sicariis, all the requirements should be observed, as is noted by Angel. de Malefic. vers. Che hai adulterato la mia Donna, n. 8 et seq., and by Joann. de Teitops [Joannes Zeithopf] in tract. de Jur. occiden. Praehens. in adult., part 2, n. 43 et seq.

This section is repeated in Ch. VIII, sec. 75, where the notes may be found.

Section 44.

[Bottini, Pam. 14, cxcviii, 202, § Sed quatenus.]

But even assuming for the sake of argument[1] that the conflict of the authorities might in some way favor[2] the accused by diminishing the penalty if the mere excess in time should concur,[3] yet he is to be considered utterly inexcusable,[4] so that he cannot escape from the ordinary penalty, when so many qualifying circumstances concur, any one of which should of itself[5] be punished with the penalty of death.

[1] Sed quatenus etiam. [2] suffragare. [3] si excessus concurreret; i.e., if the rule given in the preceding section of Bottini's argument, § In jure, cxcviii, 201, Ch. VIII, sec. 85, should be exceeded merely as to the time at which vengeance is taken, that is, ex intervallo. [4] inexcusabilis. [5] de per se.

Section 45.

[Gambi, Pam. 12, clix, 165, § Stricte ideo.]

It therefore follows that on the part of the Fisc it is only necessary to stand strictly upon this, that

it was not lawful for Guido Franceschini to kill his wife, not when detected in adultery and in the very act, but after an interval, without incurring the ordinary penalty of the lex Cornelia de Sicariis, according as we have proved in our former argument, § Alii vero, by the authority of many distinguished Doctors of the law, that a husband who kills his wife after an interval is not excused from the said penalty.

This section is repeated from Ch. VIII, sec. 76, where the notes may be found.

Section 46.

[Gambi, Pam. 12, clix, 165, § Quo jacto.]

Having thus laid the foundation of our argument,[1] we have said that the rights of the Fisc can by no means be controverted in the case with which we are dealing, since the authorities cited by my friends on the other side,[2] that excuse a husband from the ordinary penalty, speak in the case of simple homicide, and therefore should not be extended to a case greatly aggravated by qualifying attendant circumstances, for this reason, because the punishment cannot be the same when the crime is greater in one case than in the other, according to the Text in l. final. ff de Calumniat. [Dig. 3, 6, 9]; Bald. in l. cum proponas, n. 12, Cod. de Nautico foenore [Cod. 4, 33, 4]; which in our precise case we have proved by the authority of Laurent. Matthaeu, de re Criminal. cont. 12, n. 29, vers. Ex quibus.

[1] Quo jacto fundamento. Gambi in the sections immediately preceding this in Pam. 12, § Ad quid tempus, clix, 165, Ch. VII, sec. 12; § Stricte ideo, clix, 165, preceding section, lays down his fundamental proposition, that, there being no clear proof of Pompilia's guilt, Guido was subject to the strict penalty of the law for her homicide ex intervallo. Gambi now shows that

Guido's crime was greatly aggravated. Several of the pamphlets in the O. Y. B. are endorsed "Romana Homicidiorum cum qualitate," and this argument is entitled "Romana Excidii." Mr. Hodell translates "Quo jacto fundamento," "Now that this fundamental assertion in their argument is overthrown;" i.e., in the argument for Guido. [2] DD. ex adverso allegati.

AUTHORITIES

Laurent. Matthaeu (Matthaeu et Sanz), contro. 12; the case of Franciscus Palomeque, in Appendix 3.

SECTION 47.

[GAMBI, PAM. 12, CLIX, 166, § NEC AD PROSTERNENDUM.]

Nor for the purpose of overthrowing this fundamental proposition of the Fisc, can the objection be made that all the qualifying and attendant circumstances,[1] which have been assembled in behalf of the Fisc as[2] tending to and prearranged for the purpose proposed in Guido's mind, should not be considered because the purpose and intention of the said Guido Franceschini were directed to the killing of his wife and the vindication of his honor; because how fallacious this argument is can sufficiently be understood from what we have already written in § Prima enim,[3] with the section following, and in § Secunda qualitas,[4] with § Si ergo,[5] where we have proved that the learned authorities who can be cited on the other side speak and should be so understood, when the purpose is permitted and not prohibited by law, or else when some qualifying circumstance by force of particular[6] Constitutions and Banns, does not establish a capital crime entirely[7] distinct and separate, and this whether what was premeditated in the mind of the offender does or does not follow.

[1] qualitates et circumstantiae. [2] tanquam; see DuCange: "non est semper similativum sed saepe confirmativum." [3] LXIV, 68,

post sec. 49. [4] LXV, 69, post sec. 60. [5] LXV, 69, post sec. 61. [6] particulares. [7] prorsus; Mr. Hodell translates: "further capital crime."

Section 48.

[Gambi, Pam. 12, clx, 166, § In nostro casu.]

In our case according to what is conceded by the learned counsel for the defense, a husband has no right and is not permitted by law, without punishment, to kill his wife after an interval for adultery; but he is only permitted[1] by law to kill[2] a baseborn[3] adulterer, and the adulterous wife when detected in adultery. In what way, therefore, can the said authorities be applied to our case, which hold good and apply[4] only in a case [where the homicide] is permitted by law? It is under such conditions[5] that Laurentius Matthaeu speaks, who is cited on the other side, contr. 11, where in his statement of the case,[6] we read that the adulterer and the adulteress were killed[2] in the home of the husband, although in that case the husband did not get off[7] unpunished, because he had used firearms.[8]

[1] eidem permittitur. [2] morti tradere; below, morti traditos. [3] vilem. [4] sibi locum vindicant. [5] in quibus terminis. [6] in figuratione casus. [7] evaserit. [8] armis igneis.

Authorities

Laurentius Matthaeu, or Matthaeu et Sanz, contr. 11, is the case of Joannes Vecino, in Appendix 3.

Section 49.

[Gambi, Pam. 5, lxiv, 68, § Prima enim.]

Now the first of these is the assembly of armed men, for which according to the Banns of the Governor[1] of this City there is imposed the penalty of death and confiscation of goods upon him who is the head of the assembly, even if those assembled

are only four in number, as we read in cap. 82 of the said Banns.

[1] Bannimenta Gubernii; Gubernius for gubernator, or perhaps for gubernium, government. I have not been able to find the text of these Banns. Cap. 35 of the Statuta Romae, Galganetti col. 610, against unlawful assembly, is upon the same subject, but not so stringent; Cf. § Quod etiam, CXIX, 127, ante sec. 11.

The remainder of this section, vers. Quae circumstantia, is found below, section 51.

Section 50.

[Bottini, Pam. 14, cxcviii, 202, § In primis.]

In the first place, to be sure, there deserves to be considered, to this effect, the assembly[1] of armed men, constituting the crime of conventicle, which is most destructive to the public peace. In the Banns, cap. 82, the penalty of death is imposed upon its author,[2] with the declaration that it is enough to constitute this crime[3] that four armed men have been assembled. This had been formerly prohibited under the same penalty by the 75th Constitution of Sextus V, of blessed memory, which raised it to the crime of rebellion, for whatever reason it might be done. Spada, cons. 25 throughout, in the first book, proves this at large, asserting that it should generally be so understood in all cases in which an assembly[1] has been prohibited.

[1] In the first and last lines of this section, the word is "coadunatio," but the crime is designated strictly as "conventicula." According to Raynaldus Obs. cap. 25, § 1, 2 and 3, n. 1, coadunatio is a general word like congregatio, which may be innocent or lawful, while conventicula specially denotes an unlawful or prohibited assembly. Farinacius, qu. 113, n. 118, similarly distinguishes "congregatio" and "conventicula." See N. E. D. So in English law, cf. Conventicle Act of 1664. [2] damnatum respectu authoris. [3] congregatos.

The 75th Constitution of Sextus V was promulgated in 1558 and was entitled "Prohibitio ad arma ex quibusvis causis praeter hic exceptas armatorum manus aut cavalcatas tumultuosasque

hominum collectas in Statu Ecclesiastico congregandi," 2 Magnum Bullarium Romanum 623. It was primarily intended to prevent factional or private wars among the powerful nobility in their territorial disputes, and declares the assembling of armed men to constitute the offense of laesa majestas or treason. It does not specify any particular number as essential to the crime. Raynaldus, Observ. cap. 25, § 1, 2 and 3, and cap. 25, § 4, discusses this and other Papal Bulls on the same subject, as does Spada, cons. 25, book 1, cited in the text. In n. 39 Spada says: "The Pope in this Constitution has not considered the justice or injustice of the cause, or its gravity or significance, but has prohibited in general terms that any one should declare the law for himself by an armed band, even in a case most urgent and permitted by custom, because he considered only the tumult and other evils that generally arise from this assembly of armed men to the destruction of the public peace, and therefore since these evils and these tumults can arise even in the case of recovering possession forthwith, we should say that by his express and special prohibition of recovering possession by an armed band, the Pope wished it to be understood not only of that recovery of possession which is made after an interval, but also of that which is made forthwith, since in either case the final reason is the same." This Constitution was in force as to the Roman Curia until Pius X.

Section 51.

[Gambi, Pam. 5, lxiv, 68, § Prima enim, vers. Quae circumstantia.]

And this aggravating circumstance[1] cannot be evaded by the authority of certain Doctors who assert that it is permitted to a husband to kill his wife even by men assembled together, because the aforesaid authorities speak, and should be so understood, of a case in which it is permitted to a husband to kill without punishment an adulterer and his own wife in the act of adultery, or in the home of the husband himself, but it is otherwise after an interval, and outside the husband's own home, according to what is laid down by Anton. de Ball. tract. var. delitt. dispens. cas. 1, n. 65; or perhaps [these authorities] might apply, if he had

not been able in any other way to kill the adulterer and the wife. Of this opinion are all the authorities, who can be quoted in favor of the husband, but this cannot be said in the present case, since Franceschini in following his wife, being provided with firearms,[2] could have taken vengeance at the inn of Castelnuovo, where [on the contrary] he had recourse to the Judge, and chose the judicial way for the punishment of his wife, and the Canon with whom she had fled. Or in fine, [these authorities] might apply if he had assembled a smaller number of men, whereby the crime of conventicle would not have been established. And this is the more strongly to be held[3] because we are not concerned with the commission of a deed that is unpunishable[4] and permitted by law, as we have said.

[1] circumstantia et qualitas. [2] armis igneis munitus. [3] fortius. [4] impunibile.

Section 52.

[Gambi, Pam. 5, lxv, 69, § Non enim credimus.]

For we do not believe that it can be pretended by the counsel for the defendants that a husband can without punishment kill his adulterous wife after an interval, since all the authorities who can be cited in favor of the husband relieve him indeed from the ordinary punishment, but not from the extraordinary, as can be seen from the authorities cited by us above in § Hinc cum causa.[1] If therefore in our case the husband committed a punishable crime, how could he assemble the number of men forming a conventicle, and prohibited by the Banns, without incurring the penalty ordained by them?

[1] lxiii, 67, Ch. VIII, sec. 72. This of course is one of the Fisc's strongest arguments.

Section 53.

[Bottini, Pam. 14, cxcix, 202, § Pro quo effugiendo.]

In order to escape this,[1] or to avoid the capital penalty, the excuse is not relevant, that a husband may lawfully kill his adulterous wife, even by the aid of armed men assembled for that purpose. For, whatever may be the case, when[2] a husband intends to kill his wife detected in adultery, [and takes helpers] because he may[3] fear that the adulterer being armed can resist him, and perhaps may have his servants to help him, in which case, since [the husband] cannot accomplish[4] his vengeance in any other way than by calling his auxiliaries[5] together, as Caballus advises in said cas. 300, n. 58 and 59, that he may do — at any rate, in the case of vengeance taken after an interval, while the wife remains under the protection of the Judge, and there is[6] only a suspicion of adultery, the convocation of armed men can in no wise be said to be permitted; since the Constitution of Sextus V, of blessed[7] memory (the 75th of his printed Constitutions) prohibits such an assembly even in an [otherwise] lawful case, as disturbing[8] to the public peace, as Spada clearly shows, cons. 25 throughout, book 1. And therefore such assembly is much more prohibited and punishable with the ordinary penalty both of the Constitution and the provisions of the Banns,[9] since it was made for an illegal and forbidden[10] purpose, namely, to kill his wife and along with her his father-in-law and mother-in-law. And this is rendered manifest by the assertion of the Doctors who excuse from the ordinary penalty a husband who avenges himself after an interval. And in truth the path of private vengeance, which

is hateful to the law, would be made too broad,[11] if, after the husband had chosen the path of legal vengeance, and had neglected to avenge his alleged injury in the act of detecting[12] his wife in her elopement with her alleged lover, he were to be excused for taking that vengeance after an interval with complete security by the aid of armed men, and in killing her while she was off her guard, and remaining under the protection of the Judge, without any danger to himself.

[1] that is, this result, the effect of the Constitution. [2] quoties. [3] potest. [4] exequi non valeat. [5] auxiliatores. [6] vigente. [7] fael. rec. Sixti V. [8] publicae quietis turbativam. [9] dispositionis Bannimentalis. [10] damnatum; Mr. Hodell translates, "damnable." [11] ampla strueretur. [12] in acta depraehensionis.

Section 55.

[Bottini, Pam. 14, cxcix, 203, § Absque eo quod.]

This is true in spite of the fact[1] that he might be supported by the answer, that he neglected to take private vengeance only[2] because he was unarmed, and his wife was found in the company of the Canon, who was a bold and sturdy man, seeing that the husband should consider it his own fault[3] if he, alone and unarmed, pursued his wife escaping with her lover. For then he might have with better right taken his associates and pursued her with arms; and in such a case the assembly of men would have been in some measure excusable,[4] [but] not for taking besides such savage vengeance after an interval. Nay, more; if we consider the reason why a husband killing the adulterer, or his own wife, is punished with a milder penalty according to the social condition of the persons[5] concerned, if the vengeance[6] is accomplished under the very impulse,[7] that is, of inconsiderate resentment, which

cannot be controlled, the assembly of armed men to accomplish it[8] after an interval is shown to be illegal; because it is his rash resentment that causes him to expose himself to the risk of the resistance which would be made by the adulterer who does not generally go about[9] unarmed. It is because of this danger that the punishment is diminished, since it shows that the husband recklessly exposed himself to it, because of the violence of the resentment that blinds him. This is [not] the case[10] in vengeance taken after an interval with every kind of forethought, with the aid of armed men assembled for the purpose, so that the husband could not fear that any harm would befall him from carrying it out. Such preparation is entirely inconsistent[11] with that rash resentment which cannot be controlled, and from which the excuse is derived, as Farinacius replies, after weighing the words of the Texts cited to the contrary, cons. 141, n. 9 et seq.

[1] Absque eo quod. [2] in tantum. [3] sibi imputare debet. [4] aliquo modo excusabilis. [5] qualitatem personarum. [6] ultro for ultio. [7] in ipso actu sequatur. [8] ad id praestandum. [9] accedere. [10] verificatur. [11] nimis repugnat.

Section 56.

[Bottini, Pam. 13, clxxxix, 193, § Coadunatio pariter.]

Likewise the assembling of armed men and conducting them into the City, in order more safely to accomplish the destruction of the whole family, raises the offense to the crime of laesa majestas, and suggests that the punishment be increased as was asserted in our former argument.[1] Nor is this avoided by the answers delivered to us by the counsel for the defense — or rather demanded from them,[2] — and especially [by the

argument] that, since the principal crime was committed by reason of the causa honoris, just as the ordinary penalty of the Lex Cornelia de Sicariis has no application for that reason, so likewise, the penalty for an assembly imposed by the Apostolic Constitutions and the general Banns cannot be inflicted, because [as it is argued] it is merged with the penalty for the principal crime, which alone[3] is to be regarded, since it is the purpose and intention that make distinctions in crimes, as is decided in the opinion of three Judges[4] of the Sacred Rota, Blanchettus, Oranus, and Coccinus [for Seraphinus], reported after the second volume of the Consilia of Farinacius, decision 61. [This argument is unsound] because the provisions of the said Constitution and Banns would become useless,[5] if the penalty for an assembly should not exist[6] whenever[7] the assembly should have been made in order to perpetrate some crime or other that is punishable with a milder punishment. For if, as Farinacius observes in qu. 113, n. 160, and Spada quotes from him, cons. 2, n. 39, book 1, this Bull is applicable even when men are called together to arms in a case [otherwise] lawful and for a good purpose, because the Supreme Pontiff intended to provide for the public security, and to curb the audacity of those who lay down the law for themselves concerning their own deed;[8] how much more shall it apply, whenever[7] the assembly is made for an evil purpose, to wit, for breaking the law,[9] even though the crime may not deserve the ordinary punishment [of death], and this crime has been accomplished, as Spada argues in said cons. 25, n. 39, where in § Et credo, he adduces this reason, that the Pontiff, in promulgating this Constitution, considered only the tumults and

other evils, which generally occur from an assembly of armed men to the destruction of the public peace. And although his opinion has been rejected by the Doctors cited by my friend the Advocate of the Poor in § Non refragante,[10] their refutation does not extend to[11] the case of an assembly of armed men for an evil purpose, even if it be one not so criminal[12] that the death penalty can be imposed, but in a permitted case, to wit, of regaining immediate possession by resisting force with force; in which case also Spada is of opinion that the provisions of the Bull apply, and therefore their refutation does not prove that the provisions of the aforesaid Constitution are not applicable[13] to our case, since the assembly was prearranged for the destruction of the entire family which was put into execution with sacrilegious daring.[14]

[1] Pam. 14, CXCVIII, 202, § In primis, ante sec. 50. [2] repetitis; an allusion to the failure to deliver briefs of argument referred to in § In fine, CLXIII, 171, Ch. V. sec. 30. Mr. Hodell translates: "replies given or rather repeated." [3] unice. [4] trium Sac. Rotae Auditorum. [5] frustranea evaderet; or futile. [6] cessaret. [7] quoties. [8] audaciam sibi de facto jus dicentium; factum perhaps in its sense of an illegal act. [9] ad delinquendum. [10] CXXXV, 141, ante sec. 13. [11] non cadit super coadunatione. [12] criminosum. [13] applicabilis. [14] temerario ausu; Cf. § Non erit, XX, 20, Ch. IX, sec. 5; Mr. Hodell translates; "with reckless daring." See Bracton's use of these words in his chapter De crimine laesae majestatis, 118 b, in Twiss's ed., Vol 2, page 258, and cf. Dig. 48, 4, 7, 3. Twiss also mistranslates.

Section 57.

[Bottini, Pam. 13, CXC, 194, § Quin obstare.]

It is not as though[1] the opinions of the said Judges of the Sacred Rota requiring that the assembly be planned against the Sovereign or the State,[2] and not in order to commit some other crime, could form any objection; because if this

qualification be accepted as correct,[3] the Constitution would have been promulgated in vain, which raised it to the crime of laesa majestas and rebellion, for the latter crime would result[4] sufficiently from the deed itself, and from the intent to disturb the public order of the Sovereign and the State. And so far as[5] the opinion, affirmed by these authorities, does have any weight,[6] it can hold good upon the consideration of the provisions of the Constitution [only], and not of the Banns,[7] which were promulgated afterwards. For these would prove useless and vain,[8] if the capital penalty, imposed by them against those assembling armed men, could be applied only when the crime, for the commission of which the assembly had been made, was punishable with the same penalty. And moreover[9] this necessary consequence being admitted, the application of the Constitution cannot be avoided, since the plea of honoris causa cannot be alleged[10] in excuse for the slaughter[11] of Pietro and Violante, and has by no means been proved in respect to Francesca Pompilia.

[1] Quin obstare valeant. [2] Principem vel Rempublicam. [3] si qualitas verificaretur. [4] satis resultans ex ipso facto. [5] quatenus. [6] subsisteret. [7] Bannimentali. [8] inutilis et frustranea evaderet; futile or irrelevant. [9] adhuc. [10] allegabilis. [11] nece.

Section 58.

[Bottini, Pam. 6, lxxix, 86, § Tandem est.]

Finally,[1] there is also to be considered the aggravating circumstance of the prohibited arms with which the crime was committed, which of itself[2] demands the penalty of death, even though the principal crime would be punished more mildly, as is advised by Sanfelicius dec. 43 throughout, who reports that it has been so adjudged; and

Capyc. Latr. dec. 78, n. 2 and throughout, and Adden. n. 1.

[1] finally; that is at the conclusion of Bottini's first argument.
[2] de per se.

Section 59.

[Bottini, Pam. 14, cc, 204, § Secunda qualitas delictum.]

The second aggravating circumstance that increases the grade of the crime, results from the kind of arms with which the homicides were committed, since they were prohibited by the well known Constitution of Alexander VIII, of holy memory.[1] This relates not merely to carrying [such arms] but also to the keeping, introduction and manufacture of them, for any reason whatever, even under the pretext of military service,[2] and the execution of justice. And therefore they would be much more [prohibited when carried] for the purpose of taking a vengeance so impious and monstrous by destroying an entire family.

[1] san. me. Alexandri VIII. [2] militiae.

Section 60.

[Gambi, Pam. 5, lxv, 69, § Secunda qualitas ac.]

The second aggravating circumstance[1] is the carrying of arms contrary to the form[2] of the Constitution of Alexander VIII, which extends to the whole Ecclesiastical State. And the authorities,[3] which excuse a husband, can the less be cited for his release from the penalty threatened by this Constitution, if he kills his wife and her adulterer with prohibited arms, because in addition to the answer given by us in our explanation of the first aggravating circumstance of assembly and

conventicle, — namely, that they hold good, and ought so to be understood, in a case permitted by law and unpunishable[4] — we now say that they have no application at all[5] in respect to the aggravating circumstance of arms which we are now considering; since the said Constitution prohibits not only the carrying but also the keeping, the manufacture, and the introduction of them into the City and the Ecclesiastical State under the penalty of rebellion and the crime of laesa majestas. And, assuming that we may be even concerned[6] with a case permitted by law, these authorities should be understood to relate to arms the carrying of which is prohibited, but not their retention and introduction [into the City] under any pretext whatever, even that of justice, as is held in the said Constitution, § 1, where we read "or to carry them on any pretext whatever, even of military service[7] or the execution of justice, and not even[8] to keep them in one's house or elsewhere;" and in § Ad haec it prohibits also their introduction into the City; "the keeping of them in one's house, in shops[9] and elsewhere, their introduction into the Ecclesiastical State, their manufacture," etc.

[1] qualitas ac circumstantia. [2] contra formam. [3] Doctorum auctoritates. [4] impunibile. [5] applicari minime. [6] quatenus etiam versaremur; Mr. Hodell translates: "And so far as we are acquainted with such cases as are permitted by law." [7] militiae. [8] minusque. [9] apotecis; or warehouses.

AUTHORITIES

The Bull of Alexander VIII, cap. X, Aug. 13, 1690, 9 Bullarium Romanam, XXIV, p. 41, extended the prior Bulls of Pius IV, cap. 49, A.D. 1562, 2 Mag. Bull. 63, and Pius V, cap. 145, A.D. 1572, 2 Mag. Bull. 355. The Bull of Pius IV recites the danger of homicides by the use of firearms or arquebuses (quae occulte deferri possunt, et ad necem inferendam aptiora et fere inevitabilia esse videntur) and prohibited the use of such arms shorter than two palms (i.e., in barrel length) — "publice vel occulte quoquomodo aut quovis etiam militiae

aut exequutionis justitiae praetextu deferre, minusque in domibus aut alibi retinere, vendere, emere, aut permutationis in solutum dationis, pignoris, vel quocunque alio titulo recipere" under penalty of laesa majestas and rebellio. And the Bull of Pius V extended the law to swords or daggers and knives (except bread knives without point) which might not be longer than one palm. The Bull of Alexander VIII, § 4, Ad haec, confirming these bulls prohibited under the same penalties of laesa majestas, etc., the retention of such arms "domi, in apothecis et alibi, introductionem in dictum statum ecclesiasticum, fabricationem, venditionem, permutationem, receptionem," etc. The Bull is quoted in Martinus, Praxis Criminalis 312.

I have not been able to find the Banns (referred to as ch. 8, by Archangeli, § Non me latet, CXX, 128, ante sec. 18). Farinacius, qu. 108, n. 168, refers to the Banns of 1599, c. 24. Cap. 75 of the Statuta Romae in Galganetti, col. 678, is upon the same subject, but evidently not the same. The offense of carrying arms that can be readily concealed, as Matthaeu et Sanz, cont. 29, n. 20, etc., says "sub pallio," is similar to that of carrying concealed deadly weapons. According to Kennet's History of England, James I in 1612 prohibited by proclamation the carrying of pistols under a foot in length.

Section 61.

[Gambi, Pam. 5, lxv, 69, § Si ergo.]

If therefore the keeping of arms of this kind, and their introduction [into the Ecclesiastical State] are prohibited [even] under the pretext of executing justice, the pretense of Franceschini would indeed be ridiculous that it was lawful for him to go[1] to the City with the said arms in order to vindicate after an interval the pretended offense to his honor. This is the more certain because the crime concerning arms of this kind is a serious[2] one, and of itself[3] is punished with capital punishment as we have proved. In such case, when the [other] crime has actually followed,[4] if the penalty for the asportation[5] of the arms is greater than that for the crime itself, the penalty for the more serious crime is adopted which absorbs the lighter one; Bart. in l. nunquam plura n. 4 ff. de privat. delict. [Dig. 47, 1, 2 pr.]; Gloss in l. qui de crimine, verbo

Plurima, C. de Accusat. [Cod. 9, 2, 9, 1]; Capyc. Latr. dec. 18 [78], n. 2 and throughout; Cabal. cas. 100, n. 12, 13 and 14; Giurba, cons. 26, n. 1, cons. 82, n. 41; so that the offender may be punished more severely; Cabal. in said casus n. 13 and 14; Cartar. de poen. Innocent. art. 2, n. 101; Farinac. qu. 22, n. 22 and qu. 108, n. 166; Sanfelic. decis. 43, n. 2 and 3; and others who are cited and followed by Oril. ad Campan. resol. 1, n. 41.

[1] accedere ad urbem. [2] delictum hujusmodi armorum est grave; in this passage grave does not seem to have the technical signification of atrox. [3] de per se. [4] secuto delicto. [5] asportationis; not merely carrying, but taking from one place to another.

AUTHORITIES

The text Dig. 47, 1, 2 Pr. is from Ulpian: "nunquam plura delicta concurrentia faciunt, ut ullius impunitas detur; neque enim delictum ob aliud delictum minuit poenam." Ulpian says: "Who therefore robs a man and kills him is held for theft, because he robbed, and by the Aquilian law because he killed, nor does one of these actions absorb the other." The Gloss on Cod. 9, 2, 9, 1, De accusationibus: "If one commits adultery with his sister, he is held for adultery and incest."

Caballus, cas. 100, n. 12, etc.: a case where one in prison for homicide escaped by breaking the wall of the jail, and climbing over the wall of the fort. He was condemned to capital punishment, having committed several crimes: breaking jail and violation of the walls, although both tended to the same end, his escape, and therefore he should be punished more severely than if only one offense had occurred; his offenses were of different kinds, and should be punished separately. Caballus cites Decis. Lucens. 61 where one who broke open the door and windows of a house in order to commit stuprum was held liable for both offenses, or rather the penalty was increased, see ante sec. 17. Giurba, cons. 26, is not specially in point.

Capycius Latro, dec. 78, n. 2. The decision here on appeal was that the carrying of prohibited arms was merged with the wounding, and the heavier penalty, that for the wounding, was inflicted. This case is cited by Spreti, § Et in terminis, CXXXV, 141, ante sec. 16. Farinacius, qu. 22, n. 22 and qu. 108, n. 166, gives a long discussion. He says, qu. 22: "And in homicide which cannot be committed without wounding and in which the arms, the attack, and the wound are predetermined to the necessary end of the said homicide as the principal crime; then it is true that only a single penalty is to be imposed, namely, that for the greater and principal crime. Hence it is otherwise when the offenses being of different kinds, do not tend necessarily to the same end, and

are not necessarily included within the principal crime, for then although they are committed at the same time, they are punished not with a single penalty but with several." And in qu. 108: "If any one wound another with arms he is not punished with a double penalty, namely, for the carrying of arms and for the wounding, but only with the penalty for the wounding, and the penalty for carrying arms is merged with it."

Sanfelicius, dec. 43, n. 2 and 3, and other authorities are cited by Orilia ad Campan. Obs. ad Res. 1, n. 41, who says: "when the penalty for carrying arms is greater and more severe than that for the crime committed with them, the delinquent should not, according to the more correct opinion, be punished with both penalties, but with the severer penalty, either that for the crime, or for the carrying of arms, since both are merged, and the severer penalty of one crime absorbs the lighter penalty of the other."

Section 62.

[Bottini, Pam. 14, cc, 204, § Nec delationis.]

Nor is the offense of carrying arms in such a case merged with the principal crime of homicide, because when a greater penalty is imposed for the former, assuming that[1] an excuse [for the latter] has some foundation[2] which is drawn from the causa honoris, the carrying of prohibited arms should be punished[3] with the ordinary penalty as is held by Giurb. cons. 26, n. 1 and cons. 81, n. 41; Caball. cas. 100, n. 13; Farinac. qu. 22, n. 22 and qu. 108, n. 166; Sanfelic. dec. 43, n. 2 and 3. Nor are the authorities cited to the contrary worthy of attention,[4] because they apply in the case of[5] a homicide committed in self-defense, or upon provocation in a quarrel, as Policardus declares in De praehemin. Reg. Aud. tom. 2, cap. 6, n. 11 and 12. Still further, they do not apply, because they do not speak in a case[5] under the Constitution, which so severely[6] prohibits such kinds of arms, for Policardus is speaking of a Royal Pragmatic which presumes from the character of the arms the characteristic of a treacherous crime,[7] and he

asserts that this provision does not apply[8] in the case of homicide committed with the said arms in self-defense or upon provocation in a quarrel. But this provision differs absolutely[9] from the prohibition[10] of our Constitution because the latter was enacted for the total abolition of a kind of arms that is so pernicious.

[1] quatenus; Mr. Hodell translates: "as when." [2] subsisteret. [3] punienda venit. [4] attentis; for attinendis. [5] in terminis; Mr. Hodell translates: "in the circumstance;" "within the bounds." [6] districte; Mr. Hodell translates: "distinctly," as though the word were distincte, which, if it were used, would mean with distinctions or qualifications. [7] ex qualitate armorum qualitatem delicti proditorii. [8] cessare. [9] toto coelo; radically. [10] sanctione.

AUTHORITIES

These have been cited before.

SECTION 63.

[GAMBI, PAM. 12, CLX, 166, § NEQUE SUBSISTIT.]

Nor has the proposition any foundation[1] in law, or in practice, that the bearing of arms is merged with the crime committed; not in law, as we have already proved in our other argument, § Si ergo, vers. Certius,[2] nor in practice,[3] because in all the tribunals of the entire Ecclesiastical State, it is held that even when homicide has occurred in a quarrel,[4] if it has been committed with arms to carry which is prohibited under capital punishment, especially if the said arms come into the possession of the Court,[5] the greater punishment[6] is suffered; and a homicide,[7] who ought to be sentenced to a punishment less severe than the ordinary[8] because the crime was committed in a quarrel,[4] is sentenced to the ordinary punishment, because of the said carrying of arms, just as[9] Farinacius and Guazzinus declare that this is the practice[3] in

the Ecclesiastical State by force of the Banns;[10] Farinac. qu. 108, n. 168 et seq.; Guazzin. def. 29 [cap. 2], n. 18, vers. Quae opinio.

[1] subsistit. [2] LXV, 69, ante sec. 61. [3] in praxi. [4] homicidio rixoso; below, homicidium rixosum. Mr. Hodell translates: "murder in a rage" — "done in anger." [5] ad manus Curiae pervenerint; probably on account of the demonstrative nature of the evidence. The testimony of police officers alone seems to have been regarded with suspicion, according to the authorities, Farinacius, qu. 108, n. 150, etc. [6] accipitur poena major; Mr. Hodell translates: "a more severe penalty." [7] homicida; i.e., the person; not the crime of homicide. Mr. Hodell translates: "murders which should suffer the lighter penalty * * are condemned." [8] in poenam extraordinarium. [9] pro ut. [10] vigore bannimentorum; Mr. Hodell translates: "while this decree has held good."

AUTHORITIES

Farinacius, qu. 108, is cited in § Si ergo, ante sec. 61. Guazzinus, def. 29, ch. 2, n. 18; "but in the Ecclesiastical State by force of the Banns of 1599, c. 24, the penalty for carrying arms is never merged with the penalty for the crime committed with the said arms;" citing Farinacius qu. 108.

SECTION 64.

[BOTTINI, PAM. 13, CXC, 195, § PRAEPARATIO PARITER.]

The procurement[1] likewise of prohibited arms and their use should be punished with the capital penalty, if we examine the directions of the Banns and the Constitution of Alexander VIII, of holy memory;[2] and this is not sufficiently avoided by the answer delivered by the counsel for the defense that it is merged with the principal crime, so that no greater penalty can be imposed for it than the principal crime itself deserves. For, besides that the arguments above made in respect to the conventicle are opposed to such a merger as would absorb the punishment prescribed by the Banns,[3] and that the authorities cited in our previous

answer, § Nec delationis,[4] affirm the contrary, and that those brought forward on the other side can hold good [only] whenever the question concerns an assault[5] or a homicide committed in a quarrel or in self-defense, or for the purpose of the immediate reparation of one's honor, concerning which case Matth. Sanz de re crimin. speaks in said controv. 11, n. 46; — [besides all this] the difficulty is at an end[6] in our case from the clear direction of the Banns, which expressly[7] declare and command that the penalty for carrying arms is not to be merged with the penalty for the crime committed with them. Nor does the reply made by the Procurator of the Poor[8] appear to be sufficient to avoid this, viz.: that, since the Banns receive a strict construction according to the common law,[9] the rule of the latter is considered and the procurement[1] and the carrying of arms for the purpose of committing a homicide with them [which homicide is actually committed] are deemed one and the same crime;[10] but it is otherwise if the arms are not carried for an evil purpose, and afterwards some crime or other is committed with them; seeing that it would be too harsh that one who carries arms not for an evil purpose, though he afterwards commits an offense with them, should suffer a severer penalty than one who procures the same arms for the purpose of doing wrong and in addition carries them for that purpose,[11] so that these Banns could[12] never receive such an interpretation. [But] since by them the carrying of arms is forbidden as being pernicious[13] and affording an opportunity of wrongdoing, much more should the carrying of them when intended[14] for the commision of crime be considered as prohibited and punishable with a rigorous penalty,[15] especially

when the declaration of the Banns is considered that the crimes are not to be merged.

[1] praeparatio; not preparation in the sense of manufacture. [2] sa. mem. Alexandri. [3] bannimentalem. [4] cc, 204, ante sec. 62. [5] de insultu vel homicidio; Mr. Hodell translates: "insult." Insultus sometimes has that meaning. [6] cessat. [7] explicite. [8] Archangeli in Pam. 8, § Remanet tandem et seq., cxx, 127, and § Non me latet, cxx, 128, ante sections 15 and 18. [9] interpretationem passivam a Jure communi. [10] Mr. Hodell translates: "when under the common law, the Banns receive only a passive interpretation, merely the crime of preparing and bearing arms for committing murder is considered." The words "unicum delictum" I have translated "one and the same crime." Note "cum ipsis," for "cum illis." The syntax of the sentence and the whole section is awkward, but the interpolated words as bracketed make the meaning at least clear; that according to the argument of the defense the procurement and carrying of arms and the homicide are considered a single crime. [11] quam eadem praeparans ad delinquendum et etiam ad hunc effectum deferens; another awkward sentence; which Mr. Hodell translates: "than one preparing arms to commit crime, and carrying his purpose into effect." For effectus see Glossary. [12] valeant. [13] ut pote perniciosa. [14] ordinata. [15] rigorosa poena.

Section 65.

[Bottini, Pam. 6, lxxviii, 85, § Accedit ad exasperandum.]

There is added, for increasing the penalty, that as regards the unfortunate parents, there existed[1] no just cause for killing them, unless there should be considered[2] as such the suit brought concerning the rescission of the dowry contract, on account of the discovery of the fictitious birth[3] [of Pompilia]. But this rather increased the offense to the "most atrocious"[4] crime of laesa majestas on account of the absolute[5] security which the Pontifical Majesty intended to extend[6] to litigants in the City, as appears from the well known Constitution of Alexander VI, § 2 in the beginning, where we read "Horrenda inhumanitate," etc.: "Thirsting for the

death of others with frightful inhumanity and detestable cruelty;" and at the end: "In offense of the jurisdiction of the Divine Majesty and to the injury of the Apostolic authority;" and § 4 about the middle: "And they incur ipso facto the sentence of the crime of laesa majestas;" and a little further on: "And let them be in all their business 'distrusted' by all men forever, and none the less as under ban, and infamous and without civil rights."[7]

[1] suberat. [2] nisi considerari velit lis; velle used as an auxiliary. Mr. Hodell translates: "unless he wishes to consider." [3] ob detectum partum suppositum; see Glossary. [4] atrocissimum crimen; in its technical sense. [5] omnimodum. [6] or perhaps, "extended by his decree." [7] This constitution of Alexander VI, in I Mag. Bull. 474 was promulgated in 1502 and applied to all persons, ecclesiastical or lay, being parties to suits of any kind whether ecclesiastical or civil, criminal or mixed, forbidding any violence against their adversaries, or those who prosecuted their suits either as advocates or procurators, or against the Judges, witnesses or notaries. The specific acts mentioned are threats, assaults, beating, mutilation or killing, which were punished by excommunication, deprivation of office and sentence ipso facto of laesa majestas. And further, as quoted in the text: "Sintque etiam in suis bonis omnibus a cunctis perpetuo diffidati, nihilominus et banniti, ac infames et inhabiles habeantur," which Mr. Hodell translates: "And they may always be distrusted in all their good deeds by every one, and may be held as banditti, and as infamous and unfit." Sint etiam is equivalent to the "shall" of a statute. Diffidatus is a technical term; according to Calvinus, diffidare is to declare war. In Italian diffidare means to give public notice of a thing for the information of all concerned (Hoare). Here as a technical term it seems almost equivalent to proscribe, or even to place under ban. When one was diffidatus de crimine capitali he could be put to death by any one. If merely diffidatus civiliter, or condemned short of death, he was practically deprived of civil rights. A public registry was kept in Rome of the diffidati, see Galganetti, Statuta Urbis Romae, col. 563. The text has banditi, but in the Bull of Alexander the word is "banniti," i.e., under ban. The word bandit is derived from this, a highway robber being a bandit preëminently, just as we use the word "outlaw." Inhabiles means incapable in law, or without civil rights.

Section 66.

[Gambi, Pam. 12, clx, 167, § Minus applicantur.]

Still less do the other authorities apply, who were cited to escape the provisions of the Alexandrine Constitution. For although it be true, in order that the penalty threatened by this Constitution should enter the case,[1] that three things should concur, namely, malice,[2] the occasion of a lawsuit[3] and the fact that no provocation has since arisen, as Farinacius holds in cons. 67, n. 1, and others cited by him, yet in our case all the aforesaid concur. For as to the malice, there can be no doubt whatever,[4] since by the confession of the defendants themselves we have the antecedent conspiracy[5] and deliberation as to committing the homicides, and that from this preceding conspiracy malice arises, is affirmed by Decian. cons. 32, n. 15, lib. 3; Mascard. de Probat. lib. 1, conclus. 531 [532], n. 73 et seq.; Menoch. de Praesumpt. lib. 5, praesumpt. 3, n. 110; Farinac. qu. 89, inspect. 4, n. 97.

[1] intret. [2] dolus; see Glossary. [3] causa litis. [4] minime. [5] tractatum; consultation, hence plot.

Authorities

Decianus, book 3, resp. 32, n. 15; dolus proved from antecedent and subsequent acts, cited by Menochius, book 5, presump. 3, n. 110. Mascardus, conclus. 532, n. 73; dolus presumed from an antecedent consultation (tractatus). Farinacius, qu. 89, n. 97, is to the same effect.

Section 67.

[Gambi, Pam. 12, clxi, 167, § De causa litis.]

There is equally no doubt about the occasion of a lawsuit, because, on account of the asserted claim[1] of Pietro Comparini about the promised dowry for the exclusion of the said Guido Franceschini and

his wife Francesca from the property subject to the fideicommissum, not only had an action been begun[2] before Thomatus, Auditor Camerae,[3] but a judgment had even been rendered by the said judge favorable to the said Franceschini.

[1] praetensionem. [2] inchoatum fuit judicium. [3] see as to Thomatus note to § Absque eo quod, XXXIII, 33, ante sec. 25.

Section 68.

[Gambi, Pam. 12, clxi, 167, § Quod autem provocatio.]

But moreover we have it, from the confession of Franceschini himself, that the provocation whereby he was led to kill his own wife arose[1] from the cause of the alleged adultery, and on this my friends the counsel for the defense[2] principally insist. And since they can by no means[3] deny that this cause was introduced into the criminal prosecution[4] before the Judge by the said Franceschini, it is absolutely necessary to admit that the provisions of the Alexandrine Bull should apply,[5] since it speaks not only of civil but also of criminal cases, as may be seen in § 4 of the said Bull, where we read: "That henceforth in future forever, all and every persons, ecclesiastical or secular, of whatsoever quality, dignity, condition, grade, rank, and station they may be, who in their lawsuits, as well beneficial as profane,[6] also in criminal or mixed cases, in the said Court now and for the time[7] pending [should presume to threaten assault, beat, mutilate or kill[8]] their adversaries or those assisting or aiding them in their suits as their advocates or procurators," etc. And again: "If mutilation of limb or death, which God forbid, should follow, they shall ipso facto besides the loss of their case

and rights incur the sentence of the crime of laesa majestas."

[1] processerit. [2] Domini mei Defensores. [3] minime. [4] introductam criminaliter coram Judice; as a basis for a criminal charge. [5] sibi locum vindicare. [6] tam beneficialibus quam profanis; concerning ecclesiastical benefices or secular suits. Mr. Hodell translates: "under benefit of clergy or secular." [7] pro tempore; perhaps "for all time." [8] These words in brackets are inserted from the Bull to make the sense clearer. The text of the Bull is — "adversarios, vel illas pro eis prosequentes et procurantes, sive Advocatos aut Procuratores ipsorum," etc.; where "illas" refers to "causas."

Section 69.

[Gambi, Pam. 12, clxi, 168, § Et haec currenti.]

And what we have here written with a racing pen[1] by reason of the scanty time of three hours allowed us, we believe will suffice to show more clearly that the foundations of the argument of the Fisc asserted in our former briefs stand firm,[2] notwithstanding what has been elaborated on the other side so fully and learnedly, but without legal proof.

[1] currenti calamo; Mr. Hodell translates exarata, as "sufficiently canvassed." [2] subsistere.

This is the concluding section of Gambi's argument, Pam. 12, devoted to the matter of the aggravating circumstances.

Section 70.

[Bottini, Pam. 14, cci, 204, § Tertia qualitas.]

The third aggravating circumstance, likewise increasing the crime, is that the homicide was committed ex causa litis, which by the well-known Constitution of Alexander VII [VI] of blessed memory,[1] was raised to the crime of rebellion and laesa majestas, to be punished with death and the confiscation of goods. And this aggravating circumstance with respect to the slaughter of Pietro

Comparini, and Violante his wife, cannot be controverted by reason of the fact that the accused had won a victory in the lawsuit,[2] and that consequently the homicide of Pietro and Violante should be said to have been committed on account of his just resentment for the injury which they inflicted upon him, [first] by the fictitious birth of Pompilia[3] disclosed after the celebration of the marriage, in order that they might break the dowry contract; [second] by the publications of pamphlets containing great scandal;[4] and [third] by their conspiracy in the elopement of his wife, to the destruction of the honor of the accused and of his entire family. [It is claimed on the other side] that since this cause for revenging the injury is weightier than that arrising from the lawsuit, the homicide should rather be attributed to it, as[5] more proportionate thereto.[6]

[1] fel. rec. Alex. VII. [2] Mr. Hodell translates: "This qualifying circumstance cannot be denied; because the accused had won a victory in the lawsuit. And hence the offense should [not] be said to have been committed," etc. But Bottini is stating the argument on the other side in § Absque eo, XXXIII, 33, ante sec. 25; § Quo vero, CXXXVIII, 143, ante sec. 28; and § Altera causa, CXVII, 126, ante sec. 26, etc. [3] per suppositionem partus. [4] magnam detractionem. [5] tanquam, not, "as though." See § Nec ad, CLIX, 166, ante sec. 47. [6] see § Et in omnem, XXXIV, 33, ante sec. 29.

Section 71.

[Bottini, Pam. 14, CCI, 205, § Quoniam victoria.]

But since the victory that he had obtained concerned the possession[1] only, the suit which the parents had brought remaining until the present time in their petition,[2] for this reason[3] the causa litis was still continuing, and could not be said to be extinct. The injury indeed, from whatever different cause it is pretended to be derived, did

proceed from this same suit, in regard not only to the revelation of the fictitious birth,[4] but also to the scandals contained in the pamphlets concerning the poverty of the household[5] in contrast with the boasted riches, in the hope of which the marriage had been contracted, and the wretched abuse which the parents of the bride had experienced in the home of the accused — for by the dowry contract they were to have been furnished with their maintenance — while on the other hand, no proof is furnished as to their conspiracy in the elopement, and still less as to conspiracy in the alleged adultery. And therefore the cause of hatred conceived by reason of the lawsuit kept always urging him, and this does not relieve him from the penalty imposed by the Constitution of Alexander by reason of the fact that[6] the lawsuit might have been injurious[7] to the accused either substantially or to some extent,[8] because this lawsuit indeed shows the motive,[9] which is always looked for[10] in premeditated homicides, but it does not exclude the aggravating circumstance of the lawsuit, but rather confirms it, since it is obviously presumed that injustice had arisen;[11] otherwise an opportunity would be permitted to take private vengeance which is forbidden by every principle of law, and especially when a lawsuit has occurred, because then laesa majestas is committed as was shown in my other argument, § Accedit ad exasperandum [LXXVIII, 85, ante sec. 65].

[1] possessorium; possessory, probably a misprint for possessionem. See Pamphlet 10, CXLIV, 148; Pamphlet 15, CCXII, 214. [2] in petitorio. Petitorius, of or touching the plaintiff, Dig. 6, 1, 36; Italian petitòrio = a petition to a court. Mr. Hodell translates: "the lawsuit was under appeal, and the parents were still pursuing the suit." [3] adeoque illius causa. [4] suppositionem partus. [5] angustiam rei familiaris. [6] ex quo. [7] injuriosa. [8] vel in

substantia, vel circa modum. Mr. Hodell translates: "either in his substance or in the manner." Perhaps it means "either in its substance or in respect to its form." [9] causam. [10] quae in homicidiis semper requiritur; Mr. Hodell translates: "is always required in premeditated murders." [11] explicite ortam fuisse iniustitiam supponitur; perhaps we should read iniuriam.

Section 72.

[Bottini, Pam. 13, clxxxvii, 192, § Vera igitur.]

Therefore the true cause on account of which the Comparini also were put to death, could be nothing else but the hatred which had inflamed the husband, [first] on account of the lawsuit that had been brought about the fictitious birth of Pompilia,[1] which was mocking his hope of gaining a fat dowry and the succession to the estate;[2] and [secondly] his desire for revenge for the pamphlets that they had circulated, on the occasion of the institution of the said lawsuit, about the poverty of Guido's household,[3] and the wretched treatment they had received in his home. But this cause does by no means excuse him from the penalty for their premeditated slaughter; nay rather it increases it, inasmuch[4] as it raises the crime to that of laesa majestas, in accordance with the well known provisions of the Constitution of Alexander, as was proved in our previous argument, § Accedit ad exasperandum.[5]

[1] suppositionis partus. [2] i.e., to the fideicommissum. [3] angustia rei familiaris. [4] ut pote. [5] lxxviii, 85, ante sec 65.

Section 73.

[Bottini, Pam. 13, clxxxvii, 192, § Pro cujus sanctionis.]

To escape the penalty of this enactment, and the order of the Banns similar to the same,[1]

recourse is had in vain to the excuse derived from subsequent provocation, according to the decision of the Sacred Rota reported after cons. 67, of Farinacius who also approves it.[2] For, granting that[3] this provocation is alleged to result from the counsel they gave[4] for the elopement, and their complicity in the same, — besides that the proof of it is entirely[5] drawn from the letter asserted to have been written by Francesca Pompilia to the Abate Franceschini, which was so often rejected, and even disregarded by Guido himself, since in the Prosecution for Elopement no demand[6] is found that an action should be brought[7] against Pietro and Violante for their pretended instigation — [besides all this] the letter long antedated the suit brought about the fictitious birth[8] [of Pompilia] and the rescission of the dowry contract, and therefore cannot afford a provocation that will exclude[9] the causa litis; which provocation[10] should furthermore be true and not feigned,[11] and correspondent to the crime committed, as is stated by Blanc. de Indic. n. 255 et seq.; Vulpell. cons. 99, n. 2; Farinac. qu. 52, n. 145; cons. 192, n. 2, lib. 2; and cons. 221, n. 22, lib. 3; Vermigliol. cons. 25, n. 3; but that provocation, which is claimed to be drawn from the complicity of the Comparini in the asserted infidelity of Pompilia, is absolutely excluded[12] by lack of proof, not only of her infidelity, but also of their connivance[13] therein, so that the provocation derived from it is shown to be entirely irrelevant, inasmuch as it is [also] feigned.[14].

[1] conformis; I have not been able to procure the Banns on this subject. [2] id [neuter] admittentis; cf. § Absque eo quod, XXXIII, 33, ante sec. 25; § Quo vero, CXXXVII, 143, ante sec. 28. [3] quatenus. [4] praestito. [5] unice. [6] instantia. [7] procederetur. [8] longe praecessit litem motam super suppositione partus. The

subject of praecessit is epistola. Mr. Hodell translates: "Pietro moreover had long ago broken off the lawsuit brought as regards the pretended birth." Of course this was not the case. [9] provocationem exclusivam causae litis. [10] Mr. Hodell translates: "for such a cause." [11] non affectata et delicto correspondens. [12] remanet exclusa. [13] conniventiae. [14] irrelevans, ut pote affectata.

AUTHORITIES

Blancus de Indic. n. 255, is only a general statement. Vulpellus, resp. 99, n. 2, and Farinacius, qu. 52, n. 145; the principle applied in particular cases. Farinacius, cons. 192, n. 2; to effect a presumption of homicide, not light but weighty causes of the crime are required; cons. 221, n. 22, is to the same effect, neither apparently much in point. Vermigliolus, cons. 25, n. 3; in homicide cases a motive is required (or sought for) that is serious, and proportionate to the crime.

SECTION 74.

[BOTTINI, PAM. 13, CLXXXVIII, 193, § ALIA QUOQUE LIS.]

The other suit also, brought in the name of Francesca Pompilia for judicial separation,[1] is vainly alleged to be avoided[2] on account of the asserted illegality of the service of process,[3] because it was executed against Abate Franceschini who lacked a power of attorney [for it]; for his power of attorney was of the broadest kind in respect to lawsuits, as appears from its tenor as set forth in our present Summary, Number 6;[4] and so, the suit having been brought through service, as according to the Gloss on Clemen. 2, verb. Plene ut lit. penden. [Clementine, Book 2, Title 5, cap. 2, Cum lite pendente], is affirmed by Rota coram. Buratt. decis. 109, n. 1 and 5, we have to deal with the conditions[5] of the Constitution of Alexander and of the provisions of the Banns promulgated against those who offend ex causa litis. Hence the answer is irrelevant[6] which is made by the Procurator of the Poor in his argument, § Quae etiam aptantur,[7] that when the infidelity of the wife is established,[8]

her impunity from the anger of her husband, who is avenging the injury inflicted on him, should not be permitted by her institution[9] of a suit for judicial separation,[1] and that a homicide committed for the sake of the restitution of honor cannot be said to have been committed in odium litis;[10] seeing that the Procurator of the Poor takes for granted[11] the thing that is in question, namely, that the wife's infidelity had been proved (the proof of which is entirely lacking) and seeing that [the answer] would hold good at the most if, as soon as the adultery had been committed, the wife had brought suit for judicial separation.[12] But the case is different, since she instituted this suit after her husband chose the way of legal vengeance[13] by bringing a criminal action for the alleged adultery and to gain the dowry, and after he had been frustrated[14] in this hope, since no proofs [of adultery] resulted from the prosecution; so that, after her husband's mind had been exasperated, it should be lawful for her to provide for her own safety by asking for the remedy of judicial separation. And since the murder was committed upon her, pending the suit as to this, it should for every reason be expiated by the penalties imposed under the Constitution of Alexander and the Banns, the provisions of which also apply, since the wife was killed while the criminal action was still pending, which her husband had brought against her for the alleged adultery, for the said Constitution includes not only civil but also criminal actions as appears from a perusal of it.[15]

[1] super separatione thori. [2] evitari. [3] nullitatem monitorii. [4] CLVII, 162. [5] in terminis. [6] non relevante responsione. [7] CXVIII, 126, ante sec. 30. [8] constito de inhonestate. [9] per introductionem litis. [10] i.e., by reason of the hatred caused by the lawsuit. [11] supponit. [12] et ad summum procedere posset,

si statim * * uxor instituerat, etc.; Mr. Hodell translates: "And Guido might have proceeded to such an extreme." The meaning is that the argument of Archangeli in § Quae etiam might at the most apply where the wife's suit for judicial separation immediately followed her adultery. [13] Mr. Hodell translates: "but it is otherwise since he tried that revenge after the way of legal vengeance had been chosen." [14] frustratus remansit. [15] lectura.

AUTHORITIES

Burattus, dec. 109, n. 1 and 5, citing the Clementine, relates to the manner of service which should be made personally, and if the defendant cannot be found, by attaching the summons to the door of his house or of the parish church. Nothing is said as to service on an attorney. See as to service of citation in Rome, Constantinus, Vol. 1, Index, p. 385.

SECTION 75.

[BOTTINI, PAM. 6, LXXIX, 86, § PLURIMUM QUOQUE.]

Very worthy of consideration also is that aggravation of this so inhuman slaughter, that it was perpetrated in their own home, which should be for everyone his safest dwelling place,[1] as, according to the Texts in l. plerique ff. de in Jus. vocando [Dig. 2, 4, 18] and in l. nemo 103, ff. de regul. Jur. [Dig. 50, 17, 103] and Petrus Faber and Everardus thereon, is affirmed by Farinac. in fragment. Crimin. par. 1, vers. Domus, n. 130 [230]; Clar. in § final. qu. 10; Cabal. cas. 13, n. 10. And Cicero, in Orat. pro Domo sua, elegantly says: "What is more sacred, what is more protected by every religious feeling than the home of every one of our citizens! Here are our altars, here our hearths, here our household gods, and here the sacred ceremonies of our religion are preserved. This refuge is so sacred for all, that it would be profanation for any one to be dragged away from it."[2]

[1] habitaculum. [2] Cicero de Domo sua, XLI, 109, as quoted differs slightly from the text in Loeb Library. See Bottini in

§ Quibus accedit, CCII, 206, post sec. 80, as to the sacredness of the home, and Archangeli in § Non negamus, CXV, 123, Ch. VIII, sec. 59.

Section 76.

[Gambi, Pam. 5, LXVI, 70, § Tertia circumstantia.]

The third[1] aggravating circumstance is that Franceschini, with the men aforesaid, committed the homicides in the home of the Comparini and their own dwelling house, whence it results that the homicide, being committed in the house of the person killed is said to be aggravated, because one's house ought to be a safe refuge for the householder;[2] l. plerique and thereon Bartolus and others ff. de in Jus. vocando [Dig. 2, 4, 18]; Spada, cons. 107 [106], n. 4; and because the said Franceschini entered with changed clothing, in which case homicide is said to be committed by stratagem;[3] Farinac. qu. 126, with others cited by the said Spada in loc. cit. n. 5; especially at night, according to the opinion of Caball. cas. 31, n. 15, who is cited and followed by Spada, cons. 107 [106], n. 6, and before that in cons. 101, n. 6.

[1] The third qualitas, i.e., in Gambi's enumeration. [2] Domus debeat esse * * Domini refugiam. Cf. Cicero De Off. I. 139 for a similar play on words. [3] ex insidiis; treacherous, like an ambush.

Authorities in This and Preceding Section

Farinacius, Frag. Crim. Domus n. 230: "Domum suam unicuique tutissimum refugium debere esse." He adds that an assault or blow made or given in one's own home is considered much more serious than one given outside of it, and should be more severely punished. Clarus, § Fin. qu. 10, is an erroneous reference. Spada, cons. 106, n. 4; homicide committed in the home was said to be qualificatum. In this case the homicide was committed at night by masked men, and hence said to be per insidias. Farinacius, qu. 126, n. 15, similarly mentions changed clothing. Caballus, cas. 31, n. 15, refers to a case of a homicide committed before the door, but not actually within the house; apparently no distinction was made.

Section 77.

[Bottini, Pam. 14, ccii, 205, § Quarta et quidem.]

The fourth aggravation, and indeed a very grave one, is drawn from the circumstance of the place in which the crime was perpetrated, namely, in the very home of those on whom death was inflicted; and indeed in an insidious manner, by pretending the delivery of a letter[1] sent by Canon Caponsacchi. For one's own home ought to be the safest refuge for every man as was shown in our other argument, § Plurimum quoque.[2] The manner of Guido's crime has certainly a flavor of treachery as is proved,[3] not merely by his committing homicide under the appearance of friendship, but also at a time when[4] the power or duty of taking precaution is absent[5] on the part of the person killed, as is held by Bartolus in l. respiciendum, § Delinquunt ff. de paen. [Dig. 48, 19, 11, 2]; Matth. Sanz. de re crim. contro. 30, n. 57; Cravett. in Anathom. necis prodit [Grassettus, Anatome necis proditoriae], § 10, n. 5. And this precaution was without any doubt lacking in our case, since the wretched parents could not have feared such a thing from the accused, who was residing in his own country.

[1] consignationem epistolae. [2] lxxix, 86, ante sec. 75. [3] verificatur. [4] quoties. [5] cessat.

Authorities

Matthaeu et Sanz, cont. 30, n. 57, is probably an error for cont. 33, n. 14, where the subject is treated, citing Cicero pro Domo, quoted by Bottini in § Plurimum quoque, ante sec. 75. Grassettus, Anatome necis, on this point is not important.

Section 78.

[Gambi, Pam. 5, lxvi, 70, § Quarta qualitas.]

The fourth[1] aggravating circumstance is that the said Francesca was under the jurisdiction of

the Judge, since this house had been assigned to her,[2] as we have said in our statement of fact, under bond to keep it as a safe and secure prison, and so she was under the protection[3] of the court, as is held by Grammat. decis. 14, n. 4, and others cited by Farinac. qu. 30, n. 52 and 57. And this is especially so when one is arguing in favor of a person who is living under the protection[3] of the court, whatever may be said when one is arguing to his prejudice. And therefore the law declares that not even one under capital ban, who is living under the protection of the court, can be killed;[4] Bart. in l. 3, § transfugas ff. ad l. Corn. de Sicar. [Dig. 48, 8, 3, 6]; and in l. illaqueum [In laqueum] ff. de acquir. rer. dom. [Dig. 41, 1, 55]; and in l. libertas ff. de Stat. Hom. [Dig. 1, 4, 4]; Nell. de Bannit. part 2, qu. 28, with others cited by Oril. ad Campan. observ. 24, n. 31.

[1] fourth, that is, in Gambi's enumeration. [2] eidem. [3] in fortiis. The translation is not very clear; quando agitur favore illius, qui in fortiis curiae existit, quidquid dici posset quando agitur de eius praejudicio. [4] nec minus bannitum capitalem in fortiis Curiae existentem posse occidi; Mr. Hodell translates: "that one under the protection of the Court cannot be killed under less penalty than the death [of the assassin]." "Bannitum capitalem" means practically an outlaw.

AUTHORITIES

Dig. 48, 8, 3, 6. "Transfugas licet, ubicumque inventi fuerint, quasi hostes interfecere." Farinacius, qu. 30, n. 52 and 57, is to the same effect as qu. 30, n. 47 cited in the following section. Bartolus and the other authorities cited by Oril. ad Campan. appear to sustain the text, especially Nellus a San Geminiano (in Zilettus, Tractatus Criminales), Part 2 (secundi temporis), n. 28. This collection by Zilettus contains some curious and interesting treatises, as de Ponzinibus de Lamiis, Ghirlandus de Sortilegiis, and Ghirlandus, Brunus de Periglis, and others on Torture (see Nypels Bibliothéque § 228); where a treatise is of uncertain authorship, Zilettus does not hesitate to insert a woodcut of the writer. Zilettus also published a collection of Tractatus de Testibus, and his own Consilia.

Section 79.

[Bottini, Pam. 6, lxxix, 86, § Plurimum quoque, verb. Multo magis.]

Much more is this true with respect to this most wretched wife, who was detained in that home in place of a prison, with the approval also of the Abate Franceschini, so that the public security may be said to be violated and laesa majestas committed, since the same reasoning is observed as regards a true and formal prison and one assigned by authority of the Sovereign,[1] as is affirmed by Farinac. qu. 30, n. 47; Villos. de fugit. cap. 18, § 3, n. 3 et seq.; D. Canon Raynald. in prax. crim. tom. 1, cap. 3, § 2 to § 6, n. 146.

[1] a Principe.

Authorities

Farinacius, qu. 30, n. 47, after citing the authorities: "All of whom are led by this reason, that it is equivalent to be in a prison, or in a place assigned by the Judge for a prison, and not only are those prisons called public, which are locked and opened with keys and have constant guards, but a public prison can be said to be any room, for example in the palace of the Prince or elsewhere, or indeed the whole palace, or other place when the Praetor or Judge constitutes it as a prison, and so it is said to be public by the order of the Judge." See Scanarolus B. 1, § 3, cap. 2, n. 3, where he gives the form of warrant for commitment to a home as a prison.

Section 80.

[Bottini, Pam. 14, ccii, 206, § Quibus accedit.]

There is added to these a fifth very grave aggravation, likewise drawn from the circumstance of the place, with respect to that most wretched wife, who had been imprisoned at the instance of the accused, and detained in the home of her parents in place of a prison with the consent of the Abate his brother; and so she was staying there under the public security, which it was a sacrilege[1] for the

accused to violate without incurring the penalty of laesa majestas, as is held by Jodoc. in prax. crim. cap. 18, n. 2; Bonifacius de Vitalinis de Malefic. rubr. de carcer. privat. n. 8; Matth. Sanz. contr. 17, n. 12 et seq.

[1] nefas; cf. Archangeli in § Non negamus, CXV, 123, Ch. VIII, sec. 59.

AUTHORITIES

Matthaeu et Sanz, contr. 17, a case of jailbreaking and rescue. Jodocus (Damhouderius), Praxis ch. 18, n. 2; where a prisoner eludes the jailer and wounds or kills, he is punished with death.

SECTION 81.

[BOTTINI, PAM. 13, CXCI, 196, § SUPEREST TANDEM.]

There is left finally one other attendant circumstance which very greatly aggravates the crime, namely, the violation of the home assigned as a prison with the consent of the Abate Franceschini. And this is so notwithstanding[1] what can be alleged as to Guido's ignorance of this circumstance, since in the said pamphlet written in the Italian language[2] for giving a true account of the facts, it is asserted that the entire responsibility[3] of this case had been left and entrusted to the Abate[4] by his brother when Guido went away from the City, so that it becomes altogether incredible that Guido should not have been informed by him of so important[5] a matter. And as to the distinction between the violation of a public prison and of a mere custody in a home under bond with sureties, and also as to an attack[6] lawful therein by reason of the causa honoris, sufficient answer has been given in our former argument, § Quibus accedit[7] with the sections following. For the same reason applies in both cases, since in both the person

detained remains under the protection[8] of the Sovereign, whose majesty is in the same manner insulted,[9] and since the excuse would be valid [only] if the question concerned the resenting of an injury[10] inflicted in prison; and it is in respect to such cases that the authorities speak who are cited by the counsel for the accused, as is plain from an examination of them.[11]

[1] absque eo quod. [2] in dicta scriptura Italico idiomate exarata. Presumably this refers to Pamphlet 10, CXLI, 145, see CXLVII, 150. also referred to in § Sed utcunque CLXXXVI, 190, Ch. IX, sec. 22. It seems strange to us that such anonymous extrajudicial statements should be quoted. [3] omnimoda sollicitudo. [4] eidem. [5] de re tam relevanti. [6] offensionem [7] CCII, 206, ante sec. 80. [8] sub protectione. [9] cujus majestas laeditur. [10] injuria; perhaps insult. [11] ex illarum recognitione; Mr. Hodell translates: "as is evident from their recognition of them."

SECTION 82.

[BOTTINI, PAM. 14, CCII, 206, § ITAQUE GRAVISSIMA.]

And so this very grave aggravation which increases the crime cannot be avoided[1] by the dual answer given by my opponent; First, that we are not dealing with a prison properly so called;[2] Second, that a defendant is excused for his offense by reason of his just cause, viz.: the causa honoris, although he kills one in a prison;[3] since neither of these excludes the aggravation of the crime. For the irregular character of the prison would perhaps be worthy of consideration, if the question concerned a violation of the prison committed by a prisoner, and so by way of avoiding the prejudice to him arising from it; but it is otherwise when the question concerns indulgence to be shown this defendant for his avenging an injury, that had been inflicted upon him, in a home that was

assigned in place of a prison.[4] [The plea of] causa honoris indeed, can only advantage him, if the offense[5] committed in a prison follow on the very impulse of rash resentment for self-defense, in which case the authorities may apply which have been cited by my opponent; not, however, to excuse revenge taken after an interval against a prisoner, especially her who was imprisoned at the instance of her slayer, for then the qualifying circumstance of the place very greatly aggravates the crime, inasmuch as[6] it is injurious to the public safety, and involves treachery, as in similar circumstances is held by Matth. Sanz de re crimin. contr. 33, n. 14, 15 and 16; Caball. cas 13, n. 10; Carpzov. part 1 in prax. qu. 40, n. 11 et seq.; Quintilian. declam. 274, n. 1 et seq.

[1] evitari. [2] agatur de carcere improprio. [3] excusetur offendere; Mr. Hodell translates: "that one giving offense or killing in prison is excused on a just plea of injured honor." [4] one of Bottini's involved sentences. The text is, "Nam improprietas carceris forsan esset considerabilis si ageretur de violatione illius facta per carceratum, et ita de vitando eius praejudicio, secus dum agitur de illius favore ad vindicandam injuriam eidem in domo loco carceris assignata illatam." Mr. Hodell translates: "the unsuitability of a prison would be considerable if we could defend a violation of it made by one in prison and so to avoid his own injury, but if it were otherwise when we are arguing in his favor for avenging an injury to himself in a home assigned as a prison." [5] offensio. [6] utpote.

AUTHORITIES

Matthaeu et Sanz and Caballus are cited supra. Carpzovius gives a number of cases as examples of "breach of peace of the home."

SECTION 83.

[BOTTINI, PAM. 14, CCIII, 206, § EX HIS CUM ABUNDE.]

Since it clearly appears from these things that the homicides committed by the accused have so

many aggravating circumstances commingled with them that increase their degree — assuming[1] even that the opinion should have the greater weight which recommends that the punishment should be diminished for one who kills his adulterous wife after an interval, and that the alleged adultery could be said to have been proved in such a way as is required, to obtain such diminution[2] of the punishment, by all those who follow[3] the milder opinion, — yet[4] the said punishment should be increased on account of the said aggravating circumstances and the ordinary penalty of the Lex Cornelia de Sicariis be imposed to its full extent.

And therefore it seems superfluous to argue about the kind of torture, since in view of the well-known discretionary powers granted to the Most Illustrious Lord Governor, with these very urgent presumptions concurring (of which as I hear there is no doubt) the crime is great enough to be punished with the ordinary penalty, even if the qualifying circumstance of "most atrociousness" were not present, so that [according to the argument on the other side] the penalty should not be increased [also] on that account.[5]

[1] quatenus; Mr. Hodell translates "And however far the opinion has weight." [2] minorationem. [3] sectatoribus. [4] adhuc. [5] The last part of this section is repeated from the argument on Torture, Ch. V, sec. 26, where further notes are given.

Section 84.

[Bottini, Pam. 14, cciii, 207, § Caeterum nec etiam.]

However, this kind of aggravating circumstance also is not wanting, inasmuch as it results from the treacherous manner of the crime, and from the

charge of laesa majestas, which is provable in our case under three heads; namely, from an offense committed ex causa litis; from the assembling of armed men; and from the violation of the public security, because of the assignment of the home as a prison. For, according to the Apostolic Constitutions on the first and second points, the crime would be raised to such a grade, and as to the power of the Prince to do this, there can be no dispute, as is advised by Restaur. Castald. de Imperat. qu. 110, cas. 291; and, with reference to similar Constitutions by Spada [Vol. 1], cons. 1, n. 34, who asserts in such a case, that so far as concerns all legal consequences, the aggravation of "most atrocious," correspondent with such a crime, should not be thought to be called in question; as in precise terms, Spada, cons. 114 [113], n. 14 and 15, vol. 1 declares for the infliction of the torture of the Vigil.

This section is repeated from the argument on Torture, Ch. V, sec. 27, where the explanatory notes may be found.

Section 85.

[Bottini, Pam. 13, cxci, 196, § Cum ergo.]

Therefore in the present case, since so many grave aggravations concur increasing the degree of the crime, on account of which my friend the Advocate of the Poor in § Agnoscit Fiscus[1] admits that the penalty should be increased, and since such increase cannot be effected[2] except by capital punishment (for in other cases the mere homicide of a wife committed after an interval — even assuming that her adultery had been proved, which in our case has not at all been proved — could, according to the milder opinion, demand

only a diminution of the penalty), [therefore I say] the justice of the decree for the torture of the Vigil has been sufficiently defended and maintained against the contrary arguments; so that the confession being added, condign punishment remains to be inflicted for the expiation of such a wicked crime.[3]

[1] CXXXIV, 140, ante sec. 1. [2] verificari possit; or realized. [3] This section is repeated from the argument on Torture, Ch. V, sec. 35, where the notes may be found.

CHAPTER XI

THE ARGUMENT IN DEFENSE OF GUIDO'S CONFEDERATES

The four men, employed by Guido to assist him in the homicides, were probably his laborers or workmen employed on his estate, at least Alexander Baldeschi was such, called by his nickname Santi in Guido's testimony, § Ulterius non, CXXVII, 135, Ch. V, sec. 16.

Blasius or Biagio Augustinelli or Agostinelli is said to have been a resident of the town of Popolo (de civitate Plebis) living at the Villa Quadrata. The civitas Plebis, and the civitas Castellae where Alexander lived, were situated in the Ecclesiastical State, Martinus Praxis, 138, 140. Blasius in his examination confessed merely that he had been present at the homicides, but took no part in them, and this is stated by Spreti in § Quoad Blasium, CXXXVIII, 143, post sec. 42; § Facilius vero, CCXXIX, 232, post sec. 43. The Fisc was apparently contented with this confession, as he was not re-examined, § Quoad Blasium, post sec. 42. In § Confessiones, CXXV, 133, Ch. V, sec. 11, where the second confessions of the others are mentioned, his name is omitted. According to the Secondary Source, E. 263, he with Domenico was left on guard at the street door.

Domenico Gambassini was a Florentine, and therefore a foreigner in Rome, as Florence was not included in the Ecclesiastical State. Apparently he was not directly concerned in the homicides. Domenico claimed to have been a minor when the crimes were committed, that is, under the legal age of twenty-five years, and this claim was repeatedly made for him, but not substantiated.

Francesco Pasquini [Antonii] was a resident "de castro Montis Acuti," or "de Marchionatu Montis Aguti" as Gambi styles him in § Quibus controversiis, LXII, 66, Ch. VI, sec. 60, or according to the Secondary Source E. 264, of the town of Castello. He confessed to having inflicted four or five wounds on Pompilia, § Idque, XXXVII, 36, post sec. 12. Francesco was perhaps like Domenico, a foreigner, though Archangeli in § Non me latet, CXX, 128, Ch. X, sec. 18, seems to intimate that only one of the Socii was a foreigner. The meaning probably is that one of the three who carried arms contrary to the Banns was a foreigner, as Domenico seems simply to have stood guard. Francesco, according to the record of his baptism, was born February 14, 1674, and was therefore a minor. Special privilege was claimed for

him to the last, as appears from Archangeli's letter to Cencini, CCXXV, 235.

Alexander Baldeschi is said by Spreti in § Hoc stante, XXV, 27, Ch. VIII, sec. 3, to have been of the town of Tipherno, and by Gambi in § Quibus controversiis, LXII, 66, Ch. VI, sec. 60, "de civitatis Castelli." In Secondary Source, E. 264, he is said to have been like Francesco of the town of Castello, and they are both said to have been twenty-two years old, but this must have been a mistake, as advantage of the fact would surely have been taken in the argument. Alexander was subjected to torture and fainted under it. § Confessiones, CXXV, 133, Ch. V, sec. 11.

The O. Y. B. contains no argument by the Fisc against Guido's companions. Spreti in Pamphlet 16, says that no answer had then been given by the Fisc to his prior argument, and it is quite possible that the Fisc did not think it necessary. On the other hand it is hardly likely that Bottini and Gambi, zealous in the performance of their duties, would have neglected to prepare a brief as to the Socii, and this argument may have been the missing pamphlet referred to by Ugolinucci in his letter to Cencini, CCXXXIX, 238.

THE ARGUMENT PRO SOCIIS

I. In general. The plea of injured honor which relieves Guido from the death penalty also relieves his associates. Section

a. As Guido might without incurring the penalty of death kill his wife and her parents, he might lawfully assemble his friends to help him do it. They are strictly "auxiliaries" or helpers and not mandataries, because Guido was present with them. 1

b. And the rule holds good although the auxiliaries did not merely assist, but inflicted wounds with their own hands. Auxiliaries should be punished with the same punishment as their principal, or even more lightly. 12

c. And this would be so even in the stronger case of mandataries, who do the

killing in the absence of their mandant. What is lawful for the principal is lawful for the mandatary. Section 13

d. The distinction, drawn by Caballus, between mere assistance and actually taking part in the homicides, is not sound, as he depends on Paulus de Castrensis, who elsewhere held the contrary, and on Rolandus a Valle who relies on Parisius and others, although the opinion of the latter is also to the contrary. And as Rolandus a Valle is also confuted by Fachineus, the opinion of Caballus is without foundation. 14

II. As to the crime of conventicle; those who are assembled are not subject to the penalty; only he who causes the conventicle. 21

III. As to carrying prohibited arms:

a. This offense is merged in the principal crime. The contrary authorities relate to cases where the crime, committed with the forbidden arms, is entirely illegal. 22

b. At any rate the carrying of arms under the common law is a slight offense. 24

IV. The special defenses as to Dominicus and Franciscus.

a. They are foreigners and not included in the Constitution and Banns. 25

b. They were minors, and so not bound by the Constitution and Banns. 27

1. Especially as to Dominicus, whose certificate of baptism proves conclusively

that he had not completed his 24th year. To one under twenty-five, the penalty should be moderated. Section 30

2. And this is a matter of right, and does not depend upon the discretion of the Judge, inasmuch as the crime is not "most atrocious," and the rule has been held to apply in the case of homicide. 31

3. Especially as the minor committed the crime in the company of others, by whom he is presumed to be led astray. 34

4. If the Fisc relies upon the Statute of Florence, which provided for the punishment of a delinquent less than sixteen years of age, our answers are:

I. The statute has no extra-territorial application. 35

II. The statute merely provides for the punishment of minors under sixteen, but makes no provisions for those between sixteen and twenty-five, so that as to these the common law applies. 37

III. The minor was not a Florentine, but belonged in Arezzo, so the statute does not apply to him. 38

IV. And by the statutes of Arezzo minority is regulated by the common law. 41

V. As to Blasius: As he was merely present and took no hand in the homicides, the rigorous opinion of Caballus does not apply to him, although that opinion was shown to be erroneous. 42

VI. Peroration as to the Socii. 44

Section 1.

[Spreti, Pam. 2, xxxvi, 35, § Quae dicta sunt.]

What has been said in favor of Guido, the principal, also operates in favor[1] of the aforesaid Blasius, Dominicus, Franciscus, and Alexander, because they cannot be punished with the ordinary penalty, but only with the same penalty as the principal; Bald. in l. Gracchus n. 5, Cod. ad leg. Jul. de Adulter. [Cod. 9, 9, 4], where he puts a case[2] under a Statute directing[3] that one under Bann for a certain crime cannot be killed, except by the enemy who had him put under Bann, and Baldus says that if the enemy has caused him to be assassinated, the assassin is not punished. And he gives this reason, that what is lawful in the person[4] of the mandant is considered lawful in the person of the mandatary, and he says the case is expressly provided for by the said law;[5] Castrens. in l. Refectionis, n. 4, Cod. Commun. Praedior. [Error for Dig. 8, 4, 11]; where [it is said] that if it is lawful according to the form[6] of a statute for one to take vengeance upon the man who injures him, it is also lawful for him to assemble his friends to help him do it, and that they are not punished, just as the principal is not. And [Castrensis] says that Jacob. Butrigarus has held the same opinion, and in l. raptores, n. 6, vers. Sed quid si permittit. C. de Episc. et Cleric. [Cod. 1, 3, 53] in the same circumstances, and in cons. 277 under n. 3, vers. Ideo parcendum fuit eis, where [he speaks] of the case of a husband who had assembled men to thrash[7] one who planned to insult the wife's chastity. The husband enjoined his wife to pretend to give ear, and when [her lover] had come, the homicide was committed. And [Castrensis]

says that the men who had thus been assembled should be spared, because an assembly of this kind was lawful for the husband who was the principal. [So it is held by] Jason, vol. 2, in leg. 1, § Usufructuarius, n. 5, especially in his second limitation, ff. nov. oper. nunciat. [Dig. 39, 1, 20], that although the vengeance which is permitted by a statute cannot be delegated[8] to another, nevertheless he to whom it is permitted can employ[9] associates and accomplices with him for its accomplishment, and if they do the killing at the same time with him, they shall not be held for the homicide, nor for the aid which they rendered;[10] and he says that this opinion of his should be kept well in mind.[11] Caepoll. cons. Crim. 4, n. 13, vers. 2 similiter [Secundo similiter] and the following sections, also illustrates this in several cases, especially in that of certain men who killed one who was living with the sister of him who had assembled them; and Caepolla[12] says that they should not be punished, just as the principal should not, and that he obtained a judgment to that effect. He repeats the same thing in cons. 73, n. 11, and in de Servit. Urban. praedior, cap. 23, n. 11; Roland. cons. 34, n. 8 et seq. as far as 18, lib. 2; Soccin. Jun. cons. 34, n. 13 and 14, vol. 2, where [he says that it should be so held] unless perhaps you should wish to say that they should be punished with a lighter penalty than the principal, as often happens in the case of auxiliaries; and he speaks in a case like ours of men assembled by a husband for the purpose[13] of killing the adulterer of his wife, as to which case Parisius also gives his opinion, Paris. cons. 154, n. 20 et seq. vol. 4; Carer. in pract. crimin. in tract. 3, de homicid. & assassin., § 8, excusatur pater, n. 13, where he speaks

of a father who caused his daughter to be assassinated who was living a life of shame,[14] and he says that neither the father nor the assassin is held for it, folio 169; and in § 9, Excusatur maritus n. 11, he holds the same opinion in the case of a husband and his mandataries; on folio 170, reverse, he follows Marta vot. seu decision. 206, n. 9. [And see] Marsil. singul. 175, throughout, where after laying down this proposition in the beginning, that where one thing is granted, all things else appear to be granted through which it is attained, he draws an inference therefrom as to the present case and brings forward many reasons. [See also] Cassan. ad consuetud. Burgund. rubric 5, § primo. tit. Des Rentes, n. 43, page in my book 815, where he says that men assembled in this way, if they commit homicide together with the principal, are not held accountable for the killing nor for the aid they have given,[10] and see, in the same circumstances, Garz.[15] dec. 71 throughout.

[1] militant. [2] ponit casum; "put case" as Browning expresses it. [3] or "puts the case of a statute providing," etc. [4] in persona. [5] casum expressum in lege; I suppose casus expressus as opposed to casus omissus. [6] ex forma statuto, for statuti. [7] ad bastonandum eum. [8] alteri demandari; Mr. Hodell translates: "one cannot demand it of another." [9] adhibere. [10] de auxilio praestito. [11] multum cordi tenenda. [12] Not Caepollinus as Mr. Hodell names him. [13] ad effectum. [14] filiam turpiter conversantem. [15] Garzias, or Garsias; not Garzonus as Mr. Hodell names him.

AUTHORITIES

Many of the authorities cited in this branch of the argument are also referred to in the argument as to the right to employ helpers in § Praedictis nullatenus, XXXII, 32, Ch. VIII, sec. 63; § Quae benignior, XVI, 17, Ch. VIII, sec. 62; § Et in fortioribus, XXXVIII, 36, post sec. 13. The original of part of this section is reproduced on p. 4 of the Everyman edition.

Castrensis, cons. 277, is the famous consilium often cited. See § Et facit, CXXXII, 139, Ch. VIII, sec. 56. Caepolla, cons. crim. 4, also cited before; cons. crim. 73, n. 11, is not important here. Caepolla de Servitutibus, ch. 23, n. 11, by no means an authority for the text. He cites

Baldus as taking this view, and says, "This question I do not decide because it is not my subject but doubtful enough." Rolandus, book 2, cons. 34, n. 8 to 18, quotes Baldus in leg. Gracchus, and after a review of the authorities says that the right of taking this kind of vengeance cannot be delegated to another because the right of killing the wife for this cause is a special privilege not given by the common law, and therefore it cannot be transferred to another. Rolandus refers to the decision in Parisius 154, and points out, n. 33, that Parisius is speaking of a case where the husband took his accomplices with him to execute his vengeance without whose aid he could not safely accomplish it. Socinus Jr., cons. 34, n. 13, supports the text. De Marsiliis, Sing. 175; see this ante § Praedictis, XXXII, 32, Ch. VIII, sec. 63. Chassaneus Consuet. Burgund. Des Rentes, 43, see § Praedictis.

The correct references to Carerius Practica are 6 § Circa, n. 234, Octavo excusatur pater, and n. 237, Nono excusatur maritus, page 136 b and 137 of Venice Ed. of 1548 or pages 121, 121 b of the Venice Ed. of 1556. Spreti gives the pages of his book, but evidently of another edition. The citations are not very important. Spreti recurs to this argument in § Et in fortioribus, XXXVIII, 36, sec. 13. He goes further than he needs in this section. The argument of Archangeli is better.

SECTION 2.

[ARCH., PAM. 3, XLI, 41, § HONORIS CAUSA.]

The same plea of injured honor, which relieves Count Guido from the rigorous[1] penalty for the homicides that occurred,[2] certainly operates[3] to mitigate the ordinary penalty for Blasius and his associates, who took part in the homicides, although it is alleged that they did so for an agreed reward. For it may be premised[4] that we are dealing with a case far removed from assassination, on account of the presence of one having a [just] cause, according to the common opinion of Gabr. cons. 170, n. 8 et seq. vol. 1; Bertaz. cons. 143, n. 13; Guazzin. defens. 4, capit. 13, n. 3; Gratian. discept. forens. cap. 619, n. 25; Del Bene de Immunit. Eccles. tom. 2, cap. 16, dubit. 21, sec. 3, n. 3; Thor. compend. decis. par. 3, sec. 1, verbo Assassinium, where, at the end, he affirms that it has been so decided; Cortiad. decis. 95, n. 27;

Reverendis. Zaulus Episcopus Verulan. Observat. ad Statut. Faventin. lib. 4, rubr. 14, n. 17.

[1] rigorosa. [2] ob homicidia sequuta a poena rigorosa; Mr. Hodell translates: "from the rigorous penalty that should follow for the commission of the murders." [3] militat. [4] praemisso enim; I say in the beginning; Mr. Hodell translates: "it is taken for granted;" praemisso is ablative absolute. So in § Et praemisso, x, 12, Ch. VI, sec. 6.

AUTHORITIES

Gabrielius, cons. 170, n. 8, draws the distinction of the text. Bertazzolius, cons. 143, n. 13: "For an accomplice aiding an associate cannot be punished as a mandatary; even indeed if money be paid, he cannot be bound by the penalty of assassination;" and Gratianus, discep. 619, n. 25, expands the reason, "because when only the mandatary commits the crime, since he is generally unknown to his adversary the latter can hardly be on his guard, which is not the case if the principal himself also takes part, as in the case with which we are concerned, therefore it is not strange if such taking part brings about the exclusion of the penalty imposed for assassination and treachery, since in truth such men cannot be called assassins nor treacherous, although the principal who takes part with them has given them money," citing Gabrielius and Bertazzolius. Guazzinus, def. 4, ch. 13, n. 3, and Del Bene, vol. 2, ch. 16, dubit. 21, n. 3, are to the same effect. So Cortiada, dec. 95, n. 26, that a mandatary who for hire kills one who is the enemy of his mandant and his own also, is not an assassin because a man has always the opportunity of guarding himself against his own enemy. Zaulus, book 4, Rubric. 14, n. 17, lays down the general rule that it is not assassination if the mandant himself is present. This was a very barbarous case of treacherous fratricide with helpers; and it was held that notwithstanding the presence of the mandant, it was a case of assassination because he was not an enemy of the victim.

Michael de Cortiada was one of the best known Spanish legal writers, and was Advocate of the Fisc in Chancery. The latest decision reported by him was decided in 1679. Matthaeu et Sanz praises his erudition very highly. Dominicus de Zaulis, a noble of Faenza, was Deputy Judge for the Cardinal and Locumtenens General for the province of Emilia, also Bishop of Veroli. Fontana in his Amphitheatrum, and in the Addendum, praises him highly. His Observationes form a Commentary on the Statutes of Faenza.

SECTION 3.

[ARCH., PAM. 3, XLI, 41, § MAXIMA CONTROVERSIA.]

There has been the greatest controversy among the Doctors whether a father or a husband can

delegate[1] to any one, except his son, the homicide of his adulterous daughter or wife, and thus divided on either side of the question they fight like gladiators,[2] as may be seen in Farinac. qu. 121, n. 14 to 18; Caball. resol. crim. cas. 300 from n. 45 et seq; although the majority are in favor[3] of the affirmative and the milder judgment, and it appears that it has been frequently so adjudged when the case has occurred;[4] Nevizz. Sylv. Nuptial. lib. 1, sub n. 98; Mart. vot. Pisan. 206, n. 9.

[1] demandare alteri; not "demand of any one." [2] digladiantur; a free translation of course. In Cicero we find "de quibus inter se philosophi digladiari solent." [3] pro affirmativa sententia excedat numerus. [4] in contingentia facti.

AUTHORITIES

The authorities cited are the familiar ones, where the decisions and opinions upon the vexed question are collected and discussed. Caballus, cas. 300, and Marta, votum 206, are leading cases.

SECTION 4.

[ARCH., PAM. 3, XLI, 41, § SED CUM QUAESTIO.]

But since this question lies outside of our particular subject,[1] it would be a vain task[2] and absolutely[3] useless [to discuss it], nor should we waste time, the brevity of which is so pressing.

[1] extra nostram hypothesim. [2] frustraneus labor. [3] undique; completely, see Glossary. Cf. § Non negat, CXXI, 129, Ch. X, sec. 21.

SECTION 5.

[ARCH., PAM. 3, XLI, 41, § NOS VERSARI.]

It is evident that we are dealing with a case of auxiliaries called together in order to commit homicides, according to the reasoning of the Fisc. Hence [in the first place] the conditions of a simple "mandate"[1] are not only[2] inapplicable by

the immediate presence[3] of the principal, — because, as soon as such a one[4] puts his own hand to the crime, those who are doing the same are not called "mandataries" but "auxiliaries" and "helpers;"[5] Bertazzol. cons. 143, n. 12, vers. Quo vero, at end, n. 13.

[1] termini simplicis mandati. [2] corresponding with Sed insuper with which the next section begins. The colloquial form of a dictated argument appears here as in so many sections. [3] ob interessentiam. [4] iste. [5] mandatarii, auxiliatores, opem ferentes.

Section 6.

[Arch., Pam. 3, xli, 41, § Sed insuper.]

But [in the second place],[1] just as the principal[2] is relieved by the said causa honoris from the penalty of death, so are his associates and auxiliaries as the following authorities unanimously assert; Paul. de Castr. in l. refectionis, n. 4 and 5 ff. Commun. Praedior. [Dig. 8, 4, 11]; and he repeats the same in cons. 277 under n. 2, vers. Ego autem, and under n. 3 at the end, book 2, who is generally cited for the contrary opinion; Jas. in l. prima, § Usufructuarius, under n. 5 ff. de oper. nov. nunciat. [Dig. 39, 1, 1, 20]; Cepoll. cons. 4 under n. 15 and cons. 73, n. 11, and de Servitutibus Urbanor. Praedior. cap. 23, n. 10 at the end, and n. 11; Paris. cons. 144 [154], n. 21 et seq., part 4; Soccin. Junior. cons. 34, n. 12, lib. 2; Facchin. cons. 36, n. 22, versic. Quoniam praeterquam, lib. 2; Cassan. ad Consuetud. Burgundiae tit. reditib. vendit. [des Rentes vendues], rubric 5, n. 44, page in my book 948; Marsil. singular. 175, and in l. unica n. 11 Cod. de rapt. Virgin. [Cod. 9, 13]; Grammat. super constit. Si maritus, n. 2 et seq.; Garz. as may be seen by way of example,[3]

dec. 71 throughout; Farinac. qu 121, n. 20 and n. 87.

[1] Sed insuper; see note to preceding section. [2] iste; such a one. [3] ex gratia viden.

AUTHORITIES

These authorities have been cited before on this point, either by Archangeli, in the preceding section, or by Spreti in § Quae dicta sunt, XXXVI, 35, ante sec. 1. Paulus de Castrensis, "generally cited to the contrary;" see § Quia pro fundamento, XLIII, 42, post sec. 16. Chassaneus ad consuet Burgund. Des Rentes 5, n. 44; see § Praedictis, XXXII, 32, Ch. VIII, sec. 63. Fachineus, book 2, cons. 36, n. 22, cited post sec. 19, does not concern the punishment of associates but only of the principal, who he says escapes the death penalty for the homicide of the adulterer.

SECTION 7.

[ARCH., PAM. 3, XLII, 41, § QUI VERO CITANTUR.]

Those in fact who are cited in support of the contrary opinion are not speaking of a case like ours,[1] but of a husband who delegates to another[2] the homicide of his adulterous wife, not, however, of associates, who acting together with the husband kill the wife, as in our case, as may be seen from: Felin. in cap. Si vero, under n. 1 towards the end, de sentent. excommun. [Decretals 5, 39, 34], and in cap. Quae in capit. quae in Ecclesiarum under n. 13 after the middle, de constit. [Decretals 1, 2, 7]; Bartol. in l. non solum, § Si mandato meo, n. 5 ff. de injuriis [Dig. 47, 10, 11, 3]; Marsil. in said l. unica, n. 3, Cod. de Rapt. Virgin. [Cod. 9, 13] and in singul. 448; Angel. de malefic. verb. Che hai adulterata la mia Donna n. 24; Grammat. on said constitution si maritus, n. 9.

[1] in nostris terminis. [2] de marito alteri demandante; not "a husband demanding of another," etc.

Angelus de Gambilionibus of Arezzo, and hence called Aretinus, lived in the first half of the fifteenth century, and died in 1450, having attained judical office. His treatise de Maleficiis was universally cited as a standard authority.

Section 8.

[Arch., Pam. 3, xlii, 42, § Et in contingentia.]

And when the case has occurred[1] the associates who have assisted the husband in killing his adulterous wife have always enjoyed the same indulgence as the principal has obtained; that is, they have always escaped the penalty of death;[2] nay rather, they have remained[3] unpunished and acquitted; Cepoll. de servitut. Urbanorum Praediorum in said cap. 23, n. 11 at the end, and cons. 4, n. 15 at the end; Nevizzan. in Sylva Nuptial. lib. 1, under n. 98; Jason. in said l. 1, § Usufructuarius n. 5 ff. de nov. oper. nunciat. [Dig. 39, 1, 20]; Afflict. super Constit. Regn. lib. 1, Rubric 8 de Cultu; Paris. n. 30 [vol. 4, cons. 154, n. 23].

[1] in contingentia facti. [2] paenam ultimi supplicii. [3] remanserunt; like an auxiliary. Appendix 4.

A repetition of the argument and authorities contained in the preceding sections, and in Spreti's § Quae dicta sunt, xxxvi, ante sec. 1.

Section 9.

[Spreti, Pam. 9, cxxv, 133, § Delictum autem.]

But the crime which has been charged against Count Guido and his companions, and which they have themselves confessed, was shown at large in our past argument to be neither of the first or second kind.[1] And indeed since Count Guido was led to kill Francesca Pompilia his wife, and Pietro and Violante his parents-in-law, or to cause them to be killed, by reason of causa honoris, namely, on account of the adultery which the said Francesca Pompilia committed with the connivance and assistance of the others, this[2] [causa honoris] relieves from the penalty of death not

only[3] [Guido] himself — according to the Texts and the authorities cited in our said argument, § Hoc stante [xxv, 27, Ch. VIII, sec. 3] with the following sections connected therewith, § Praedictis nullatenus [xxxii, 32, Ch. VIII, sec. 63] and the sections following: —

[1] non primi nec secundi generis; that is, possesses neither of the essentials required for the infliction of the torture of the Vigil, being neither "most atrocious," or indicated by strong suspicion. See § Ut enim dicebamus, cxxv, 133, in the argument on Torture, Ch. V, sec. 12. This section is repeated in Ch. V, sec. 14. Mr. Hodell translates: "But the crime * * is murder neither of the first nor of the second degree." [2] ista. [3] non solum; refers to Verum et, with which the next section begins.

Section 10.

[Spreti, Pam. 9, cxxvi, 134, § Verum et socios.]

— but also[1] his companions, according to the authorities likewise cited in our said argument, § Quae dicta sunt [xxxvi, 35, ante sec. 1] with the three following sections, to which may be added; Bald. in l. 1 in second lecture, n. 36 at the end, Cod. unde vi [Codex 8, 4], and in cap. De cetero n. 4, vers. Sed pone de sent. et re Judic. [Decretal. 2, 27, 5]; Joann. de Anan. in final chapter, n. 2, vers. Ultimo pro ampliori, de Raptor. Incendiar. etc. [Decretal. 5, 17, 7]; Roman. in l. 1, § Usufructuarius n. 17 ff. de oper. nov. nunciat. [Dig. 39, 1, 1, 20]; Marsil. in lege unica n. 13, and two following sections, C. de Rapt. Virgin. [Cod. 9, 13]; Gabriel. cons. 170 n. 3, where we read "And much less should they be punished with death, because (since on consideration of the general opinion of mankind, just resentment may excuse Fabritius[2] from the severer punishment, l. Gracchus. Cod. de Adulter.)[3] those also who are called by him, and

led to the crime, should likewise be excused;" and [Gabrielius], n. 13, book 1; Mazzol. cons. 57, n. 18; Facchin. cons. 36, n. 22, book 2; Alex. Rauden. var. cap. 7, n. 5; Grammatic. super constit. Regni, Si maritus, which is in book 3, rubr. de poen. Uxor. in Adulter. depraehens. n. 12, page 109; Matthaeu de re Crimin. contr. 11, n. 42, with the sections following; Viv. dec. 197, n. 26.

[1] Grammatically this section is connected with the preceding non solum ipsum * * verum et socios. [2] The quoted text of Gabrielius is: "et eo minus debent morte hi affici, quia cum inspecta opinione hominum communi fabritium excuset a graviori poena justus Dolor," etc. Mr. Hodell translates "fabritium," "of the wise men." Fabritius [Fabricius] was the name of the defendant, the principal in the case; perhaps a pseudonym instead of his real name, as was sometimes the practice, as Titius, etc. This, however, is unimportant. [3] Mr. Hodell translates: "according to the Gracchian law, Code concerning adultery." It is the oft cited l. Gracchus, Codex 9, 9, 4, "Gracchus quem Numerius," etc.

AUTHORITIES

Nearly all are cited elsewhere. Mazzolus, cons. 57, a case of a husband, not of associates. Fachineus, cited § Sed insuper, XLI, 41, ante sec. 6. Matthaeu, cont. 11, the case of Joannes Vecino. See Appendix 3. Vivius, dec. 197, n. 26, cited § Neque delictum, XVI, 17, Ch. VIII, sec. 64.

SECTION 11.

[SPRETI, PAM. 16, CCXXIX, 232, § ET SICUTI ISTA.]

And just as that cause[1] is sufficient to obtain a diminution of the penalty with respect to Count Guido, so should it be considered likewise[2] sufficient to obtain it in favor of his companions, who as auxiliaries[3] cannot be punished with a greater punishment than the principal himself, according to authorities almost innumerable, and indeed of great reputation, who are cited not only in my past argument, § Quae dicta sunt [XXXVI, 35, ante sec. 1], but also in my present argument, § Verum

et Socios [CXXVI, 134, ante sec. 10], to which no answer has been given by the other side.[3]

[1] that is the causa honoris, mentioned in § Sicuti autem, Ch. X, sec. 2. [2] pariformiter. [3] tanquam auxiliatores. As has been stated the O. Y. B. contains no argument by Bottini or Gambi contra Socios; it is doubtful whether Signor Cencini failed to receive a copy, or the counsel for the Fisc considered it unnecessary to make an argument.

SECTION 12.

[SPRETI, PAM. 2, XXXVII, 36, § IDQUE NON OBSTANTE.]

And this is so, notwithstanding that one of the aforesaid [associates] had wounded with his own hands, or had even killed one of the aforesaid [persons], as Franciscus has confessed that he inflicted four or five wounds on the back of Francesca Pompilia; because even in these circumstances[1] the rule applies that auxiliaries, or those lending aid, shall not be punished[2] with a severer punishment than the principal, as the following authorities of those recently cited unanimously[3] assert; Castrens. in said leg. Raptores n. 6, C. de Episc. et Cleric. [Cod. 1, 3, 53]; and in said cons. 277, under said n. 3, vol. 2; Jason. in said l. 1, § Usufructuarius, n. 5 in 2 limit. ff. de nov. oper. nunciat. [Dig. 39, 1, 1, 20]; Chassan. ad consuetud. Burgund. rubr. 5, § 1, tit. Des Rentes n. 43, page 815. And so Garz. in said decis. 71 states it has been adjudged: — "Whether it be lawful for one to employ associates to accomplish the deed, who shall by no means[4] be held either for the killing or for their aid, if they kill the adulterers, acting together with their employer? and it was adjudged that it was so."

[1] in his terminis. [2] militat regula de non puniendo. [3] in individuo, without division, as one man. Mr. Hodell translates: "individually." [4] minime.

Section 13.

[Spreti, Pam. 2, xxxviii, 36, § Et in fortioribus.]

And in the stronger case of one killing by assassination, and so even in the absence of his principal, this was the original opinion of Baldus in l. Gracchus n. 5, where he distinctly says: "It is lately questioned whether the assassin is punished, and I say that he is not, because what was lawful in the person[1] of the mandant was lawful in the person[1] of the mandatary," Cod. ad leg. Jul. de adulter; Castrens. in said leg. Refectionis n. 4 [Dig. 8, 4, 11], "Because what I can do myself,[2] I can do through my servants necessary for it." And in Afflict. super constit. Regn. lib. 1, rubr. 8, n. 30: "Not only by one's self, but also by another, even for money, and likewise by an assassin, and Baldus on the same text says the same thing, because that which is lawful in the person of the principal is lawful in the person of the mandatary," and he affirms that it has been so adjudged; and in lib. 3, rubr. 46, n. 3, he likewise says that it has been so adjudged, and in n. 4; Carer. pract. crimin. in 3 tract. de homicid. et ass., § 8, excusatur Pater n. 13, fol. 169, and § nono excusatur maritus n. 11, fol. 170 reverse; Monticell. eodem tract. reg. 6 de mandatar. n. 14, fol. 59; Nevizan. Silv. Nuptial. lib. 1, verbo Non est nubendum, n. 98, especially "et hoc aliis mandare." And Mart. in said vot. seu decis. 206, n. 9: "And much more is this so, because the authorities declare that a husband who on account of fear cannot kill the adulteress, may employ another to kill her even for money, and neither is to be punished."

[1] in persona. [2] per me.

AUTHORITIES

Spreti repeats his former argument in § Quae dicta sunt, XXXVI, 35, sec. 1. Marta, vot. 206, n. 9; the correct quotation is "maritum, qui prae timore *adulteram* occidere nequit, posse alteri demandare, ut *illum* pro pecunia etiam occidat," where it should read *adulterum*. Spreti, however, retains "adulteram," and reads "illam" for "illum." Baldus in his notes on l. Gracchus, refers to the case (perhaps only mooted) where a statute of Bologna punished anyone who should shed blood in the Palace, the question being whether it applied to a barber who bled the Prince there? Baldus said it did not. Blackstone, i, 60, cites from Puffendorf a similar statute of Bologna. Many of these references are also in § Neque delictum, XVI, 17, Ch. VIII, sec. 64.

SECTION 14.

[SPRETI, PAM. 2, XXXVIII, 37, § QUIDQUID IN CONTRARIUM.]

[This is so notwithstanding] whatever Caballus may say to the contrary in his said casus 300, n. 73, because he grounds himself on the authority of Castrens. in said cons. 277, book 2, and Roland. in said cons. 34, n. 19, 31 et seq. vol. 2; but Castrensis favors our opinion as may be seen in n. 3; Rolandus indeed should not be considered, because, when he advances a similar opinion about a statute that permits one to take vengeance, and says that since permission of this kind is personal[1] it cannot pass on from the person[2] of him [to whom it is given], his opinion is expressly contrary to the teaching of Baldus, Castrensis, Jason, and others whom we have cited above, § Quae dicta sunt,[3] and since this opinion of ours is juster and milder, we should hold to it, as Jason has decided on this point[4] in said l. 1, § Usufructuarius, n. 5 towards the end, ff. de nov. oper. nunc.

[1] personalis. [2] persona. [3] XXXVI, 35, ante sec. 1. [4] in puncto.

Rolandus a Valle, of Casale, was President of the Senate of Montferrat, and one of the often cited authors. Bayle says that his Latin style is very mean, but he does not seem preëminent in that respect.

Section 15.

[Arch., Pam. 3, xlii, 42, § Nec afficit distinctio.]

Nor does the distinction drawn by Caballus in said casus 300 n. 73, affect the question, where he holds that [while] associates can indeed with impunity assist a husband or a father in killing the daughter or wife respectively,[1] in order that they may kill her with greater security, yet that these associates cannot, however, help with their hands[2] and do the killing, for if they do[3] they should be held for it.

[1] respective. [2] manibus se ingerere. [3] nam alias de occiso tenerentur. The full text of Caballus is "Debent tamen isti associantes convocati, filiis exceptis, omnino abstinere ab offensione adulterae, vel adulteri, sed debent solummodo assistere patri, vel marito occidenti, qui eos, ut securius interficerent, convocavit; alias, si manus ingererent et occiderent, de occiso tenerentur;" citing Rolandus and Castrensis: "Nevertheless those who are summoned as associates, except sons, should entirely abstain from attacking the adulteress or adulterer, but they should only assist the father or the husband who kills, and summoned them in order to kill more safely; otherwise, if they lay on their hands and kill, they should be held liable for the homicide; Roland. cons. 34, n. 29, and 31, book 2, and this appears from what is said by Castrensis, cons. 277, book 2." Petrus Caballus was Auditor General and Councillor of the Grand Duke of Tuscany, in the beginning of the 17th century. His Resolutiones are cited over thirty times in the O. Y. B.

Section 16.

[Arch., Pam. 3, xliii, 42, § Quia pro fundamento.]

Because for the foundation of his distinction he planted himself[1] on Paulus de Castrensis in his said consilium 277, book 2, who is so far from approving his proposition that he rather refutes[2] Caballus in a remarkable way. For after Castrensis had proposed to himself a difficulty of this kind under n. 2, he adds there: "But I hold the

exact contrary, that neither the one who killed nor the one who made the assembly (congregationem) can be said to be held[3] for the homicide, so far as concerns the infliction of capital punishment."[4]

[1] figit pedes. [2] quin potius mirifice retorqueatur. [3] potest dici quod teneantur. Mr. Hodell translates: "who made the assembly (as it may be called)." Potest dici does not mean "as it may be called" nor does it refer to congregationem. Probably dicere is used here in the sense of accuse or prosecute. [4] The rest of this passage of Castrensis is "because they did not especially give their assistance for an unlawful purpose, but a lawful one, nor were they guilty of malice (in dolo), it being granted even that they were guilty of excess in their method (in culpa in excedendo modum)."

Section 17.

[Arch., Pam. 3, xliii, 42, § Et in consil. Rolandi.]

And [Caballus also relies] on Rolandus a Valle [Book 2], cons. 34, n. 29 and 31.[1] But may that very distinguished Doctor[2] pardon me, because although he attempts to confute Paulus de Castrensis in said cons. 154, which is in our favor,[3] under the assumption that [Paulus] is speaking contrary to the common opinion, this is not sufficient under the above cited authorities, and if time permitted, I would have shown this more clearly.[4]

[1] Mr. Hodell translates: "This is also true in the council of Rollandus a Valle." [2] i.e., Rolandus a Valle. [3] pro nobis militantem. [4] The passage cited by Rolandus from Castrensis and thus criticized, is the latter's commentary on l. raptores C. de Episco. et Cler. Codex 1, 3, 53 [54]. The reference to cons. 154 seems an error, confused with the consilium of Parisius.

Section 18.

[Arch., Pam. 3, xliii, 42, § Praeterea Rolandus.]

Besides, Rolandus cites Parisius in cons. 154, book 4. But he might have omitted Parisius

because the latter expressly refutes him, particularly[1] in n. 22, where we read: "And in our case there is a most excellent decision of Paulus Castrensis in his above cited consilium,[2] where in stronger circumstances, including also the present case, he concludes that those who are privy to the deed,[3] present, and associated with the husband in the act of the said homicide, and those also who give their aid, ought not to be punished with a greater penalty than the principal; according to the Regula, Accessorium,"[4] de Regulis Juris in 6 [Sexti Decretal. 5, tit. 12, reg. 42] — beside the accurate authority[5] of Marsilius — and he concludes that at the very worst,[6] the utmost rigor having been considered,[7] they ought not to be punished with more than temporary relegation.

[1] in specie; as opposed to in genere. Mr. Hodell translates: "on its very face." [2] The "consilium" of Castrensis here referred to by Parisius is said to be 192, but this is an error. Perhaps Book 2, cons. 277, or more probably his commentary on l. raptores is intended. The quotation is slightly inaccurate. Parisius says "ac praestantes opem puniri debere mitiori poena quam principalis committens homicidium." [3] conscios. [4] "Accessorium naturam sequi congruit principalis." [5] punctualem auctoritatem. [6] ad omne peius. [7] considerata omni rigorositate.

Petrus Paulus Parisius was born at Consenza in Calabria, was Professor at Padua and Bologna, and wrote in addition to his Consilia, a commentary on parts of the Pandects. He became a Cardinal.

Section 19.

[Arch., Pam. 3, xliii, 42, § Ultra quod Rolandus.]

And besides this, Rolandus in his said consilium is expressly[1] refuted by Fachineus in said cons. 36, n. 22 versic. Quoniam praeterquam, lib. 2. Nor is this without vital reason, for just as an aggravating circumstance,[2] which changes[3] the character of a crime in the principal delinquent,

makes it worse also in the case of his auxiliaries, whenever[4] they are aware of it,[5] so every rule of equity demands that a circumstance, which lessens the penalty for the principal, should also help the auxiliaries when they know of it;[5] Decian. tract. crimin. lib. 9, cap. 33, n. 8 and cap. 36, n. 27; Farinac. qu. 135, n. 34 and 36. Therefore Caballus remains without stable support and opposed to the opinion of so many authorities that have been cited, who make no distinction between those who merely assist by their presence,[6] and those who take part in the homicide; indeed they all speak of "auxiliaries;" and besides it is found to have been very often so adjudged even in the stronger case[7] of one actually directed to kill, as was said above; and thus the causa honoris is effectual, not only to extend its protection over mere mandataries, but also mandataries whose crime is aggravated by the circumstance of assassination, and cause their acquittal, as we find it decided in Carer. pract. crimin., § Nono excusatur, n. 11, page in my book 197 (reverse); Mart. Voto Pisan. 206, n. 9.

[1] expresse. [2] qualitas. [3] alterans. [4] quoties. [5] cognita, agnita; there does not appear to be any distinction here between cognoscere and agnoscere. Mr. Hodell translates: "agnita" as "unknown." [6] assistentes. [7] in fortioribus terminis.

AUTHORITIES

Farinacius, qu. 135, n. 34, who cites Decianus, says that a mandant should not be punished with the same penalty as the mandatary when there is, in the case of the latter, some modifying circumstance which increases the penalty and the crime, that does not exist in the case of the mandant, and e contra, a modifying circumstance that aggravates the case of the mandant or excuses him, also aggravates or excuses in the case of the mandatary. "This subject is very intricate and has many distinctions, concerning which I refer the reader to Baldus," etc.

Marta, Vot. Pisan., dec. 206, has been frequently cited as a leading authority. Fachineus cons. 36, n. 22, book 2, opposes Rolandus.

Section 20.

[Arch., Pam. 3, xliv, 43, § Unde si mandatarii.]

Hence if both mandataries and assassins are exempt from the ordinary death penalty, whenever[1] they kill an adulteress by the mandate of her husband, it necessarily follows that the distinction of Caballus is not correct, nor is it received in practice; because if they are mandataries we cannot deny that they might kill with their own hands, and nevertheless, besides the decisions above cited, Clarus, § Homicidium, n. 51 near the end, declares that this opinion in favor of[2] the defendants is followed in practice[3] contrary to that of Caballus.

[1] quoties. [2] favorabilem. [3] in practica.

Authorities

Clarus, § Homicidium, n. 51, after referring to the conflict of authorities: "It is well established that a father or husband may delegate this business to his own son, and so Baldus held in l. Gracchus, n. 5. And this is said to be the more frequent opinion by Didacus super 4 decretal page 140, n. 5. That this is also commonly held by the authorities is affirmed by Anton. Gomez., l. 80, Tauri, n. 61. Nay more, many have held that he can even delegate it to others. And this opinion is followed in practice, as I find it adjudged in an actual case by the Court of Naples according to Afflictis super 3 par. Const. Regni Rub. 46, n. 4, whom Carerius cites in his Practice, page 445, n. 240. Caepolla also asserts that he has so held in practice, De Servit. urb. ch. 23, about the end."

Bartholomaeus Caepolla, who died in 1475 or 1477, was a very celebrated writer of Verona. His treatise de Servitutibus is his best known work and a great authority. This and his consilia are frequently cited in the O. Y. B.

Section 21.

[Arch., Pam. 3, xliv, 43, § De qua agi.]

We cannot believe that this argument is made by reason of the alleged conventicle; since those who are assembled are not subject to any penalty for the conventicle, but only he who assembled them,

as Baldus excellently[1] asserts; Bald. in cap. Quae causae, n. 13, vers. Tu dic de his, quae vi metusque caus.; Farinac. qu. 113, n. 140.

[1] egregie.

AUTHORITIES

Farinacius, qu. 113, n. 140; "the ordinary penalty for conventicle, both as against the State and another person, applies to him who was the author and contriver of the said conventicle and illegal assembly; not to him who was not the author of it, but one of the assembly, for he is punished with a milder penalty than the principal who collected and contrived the assembly; but this penalty is at the discretion of the judge."

This section is repeated in the argument on Torture, Ch. V, sec. 6.

SECTION 22.

[SPRETI, PAM. 2, XXXIX, 37, § NEQUE VERO.][1]

Nor indeed can the punishment in a case like this be increased on account of the alleged carrying of prohibited arms, because the latter offense is merged with the crime; Baldus in l. adversus in fine C. de furt; Jas. in l. quod dicitur n. 3 ff. de verb. oblig.; Marsil. in l. si in rixa n. 15 ff. ad l. Corn. de Sicar.; and cons. 51, n. 51 [57] vers. Cum ergo ista portatio armorum; Cephal. cons. 204, n. 42 et seq. vol. 2; Farinac. qu. 108, n. 166; Guazzin. defens. 26 [29], cap. 2, n. 18; where [it is thus held] even if a greater penalty was imposed for the carrying of arms [than for the other crime]; and so whenever it is evident that the crime was committed with cause and from just resentment, as in the present case, the carrying of arms becomes unpunishable,[2] or at least is not to be punished with a greater penalty than that which should be imposed[3] for the [principal] crime itself; just as it is well shown by Policardus in speaking of arms which are considered treacherous[4] according to

the Banns; Police. de Reg. Aud. tom. 2, tit. 10, cap. 5, n. 11, page 25.

[1] referred to by Spreti, § Et in terminis, CXXXV, 141, Ch. X, sec. 16. [2] inpunibilis. [3] venit apponenda. [4] proditorius.

See this section repeated Ch. X, sec. 14, and the authorities referred to.

Section 23.

[Arch., Pam. 3, xlvi, 45, §. Neque rigorosa.]

Nor should the rigorous penalty of death be inflicted for the alleged carrying of arms of forbidden measure; not merely[1] as against Dominicus Gambassini and Franciscus Pasquini because they are just like foreigners,[2] and had not been living[3] in the Ecclesiastical State for a sufficient length of time for knowledge of the law to be presumed in their case, but neither [should the death penalty apply] against the others, for although the death penalty is threatened by the Constitutions and Banns even for the carrying of arms or keeping them, nevertheless since the carrying of arms is likewise not prohibited on account of the thing itself, but for the destructive end which follows it, or may follow[4] it, and since the carrying of arms was directed towards the said homicides, and since these homicides, although they were not altogether[5] lawful, are yet not entirely without excuse,[6] [it follows that] the crime of carrying arms of this kind should be merged with the end for which they were carried, because the one is included in the other, lest the means[7] should seem to be worse than the end. And although according to the opinion of some the penalty of carrying arms should not be merged with the crime committed[8] with them, whenever[9] it is the severer [of the two],[10] yet it seems this should be so

understood when the crime that is committed with them[11] is entirely illegal, and without excuse,[6] but not when the crime is decreased and diminished and even excused, in part at least, by reason of the cause for which it was committed.[8]

[1] nedum. [2] uti forenses; see as to their citizenship prefatory note to this chapter and post sec. 25. [3] versantes. [4] sequi potest; can for may. [5] in totum licita. [6] inexcusabilia. [7] media. [8] admisso; at the end of the section, commissum. [9] quoties. [10] Mr. Hodell translates: "whenever the latter" (i.e., crime) "is the graver." [11] cum eis; that is with the forbidden arms.

This question of merger is fully considered with reference to Guido's case, ante in § Neque vero, XXXIX, 37, etc., sec. 22, Ch. X, sec. 14.

Section 24.

[Arch., Pam. 3, XLVI, 45, § In omnem casum.]

At any rate[1] this is so since the carrying of arms is a slight offense,[2] consideration being given to the common law;[3] Bartolus in l. levia, n. 99, ff. de Accus. [Dig. 48, 2, 6] and in l. Divus la. 2, n. 8, about the middle ff. de Custod. Reor. [Dig. 48, 3, 3]; Marsil. in Pract. crim., § Pro complemento, n. 44; Danz. Pugn. Doctorum tit. de Armis cap. 2, n. 1; Rovit. super Pragmatic. Regn. Pragm. 4 de Armis n. 34; Caball. Resol. crimin. cas. 107, n. 17.

[1] in omnem casum. [2] leve delictum, as opposed to grave, practically equivalent to misdemeanor. [3] cum Jure communi attento.

Authorities

Caballus, cons. 107, n. 17, refers to the common law right to carry arms for self-defense; he says that the mere carrying of arms contrary to a statute is not a great offense. Danza, Pugna, tit. de armis, cap. 2, n. 1, is apparently De Armatione, cap. 8, n. 2, which supports the text; so Rovitus in Prag. 4 de Armis, n. 34.

Section 25.

[Arch., Pam. 8, cxxii, 129, § Non loquor.]

I do not speak of Dominicus and Franciscus, because these last two, just like foreigners,[1] are not bound by our Banns. But all and singular the reasons for the mitigation of the penalty which apply in favor of[2] Count Guido, also apply in favor of all his associates, since that which is accessory should not be judged upon an inequality with its principal;[3] as I showed in my other argument not by merely asserting the authority of one or two Doctors, but by citing the decisions of the highest courts; and that this opinion is followed in practice is affirmed by Clar., § Homicidium under n. 51.[4]

[1] Archangeli in this section and in § Neque rigorosa, xlvi, 45, ante sec. 23, speaks of Dominicus and Franciscus as just like foreigners, i.e., to be considered as foreigners, "uti" or "veluti forenses;" but Spreti in § Quae eo facilius, xxxix, 37, post sec. 26, says they *are* foreigners. See also § Et quoad Dominicum, ccxxix, 232, post sec. 29. [2] militant pro. [3] cum accessoria non judicentur ad imparia cum principali. [4] Archangeli would seem to hold that the decision of a court is of higher authority than the opinion of a Doctor, and yet in the next sentence he appeals to Clarus. The same citation is made in § Unde si mandatarii, xliv, 43, ante sec. 20.

Section 26.

[Spreti, Pam. 2, xxxix, 37, § Quae eo facilius.]

And these things should more readily follow with respect to Dominicus and Franciscus, who are foreigners, and therefore are not included in any of the Apostolic Constitutions or Banns prohibiting the carrying of arms under the severest penalties; Farinac. qu. 108, n. 17; Police. de Reg. Aud. tom. 2, tit. 10, cap. 5, n. 43, page 29.

AUTHORITIES

Farinacius, qu. 108, n. 17, holds that if foreigners carry arms they should be punished according to the statutes or banns, but adds the qualification, providing that the penalty is either a pecuniary fine or corporal punishment, as whipping, but not if it is severe; but if the question arises of a severer penalty, such as is imposed for carrying a dagger or an arquebus for which the Banns and Apostolic Constitutions impose the penalty of the galleys, confiscation of goods, or death, "then I say to hold foreigners bound by this sort of statutes or edicts, who very likely are ignorant of so rigorous a penalty, seems to me to be too severe, and if I were a judge I would never impose such a penalty on foreigners, especially those who come from a distant place where such statutes are not in force."

SECTION 27.

[SPRETI, PAM. 2, XXXIX, 37, § PRAESERTIM CUM.]

Especially since they are minors as appears in Proceedings, page 35 and 304 respectively, in which case likewise they are not bound by the Constitutions and Banns making minors capable in law of committing crimes,[1] on account of the lack of jurisdiction of the Prince or the official promulgating them; Farinac. fragm. crim. par. 1, verbo Bannimenta, n. 33, vers. Tertius est casus; Cavalc. de brach. reg. part 4 under n. 464; Surd. dec. 197, n. 6.

[1] minoris (minores) abilitantibus in delictis. Mr. Hodell translates: "which give judgment upon the crime of a minor." Habilis means capable in law of doing a thing or acting. Habilitare, to make legally capable, to give or impose capacity, to render sui juris.

AUTHORITIES

Surdus, dec. 197, was a case of a contract not made in Mantua, so that the Mantuan Senate held that it was governed by the lex loci contractus, and the Statute of Mantua did not apply. Farinacius, Frag. Crim. Bannimenta, is more in point; he says: "The third case is where the Banns or Statutes punishing an act condemned by the common law make a person capable or incapable of committing the crime. For these foreigners are not included according to the authorities cited by Joannes Baptista de Sancto Severino, where he gives an example of a statute providing that one over eighteen years shall be held liable, or on the other hand that one less than fourteen years shall not be so held;

because statutes of this kind do not include foreign minors for this reason that statutes cannot make persons capable or incapable of the crime who are not subjects thereto."

Cavalcanus, de Brachio Regio, part 4, n. 464, is an instance of a statute affecting the criminal liability of minors and is authority for the strict construction of such a statute.

Section 28.

[Spreti, Pam. 9, cxxxviii, 143, § Voluissem etiam.]

I might have wished to add something to what I have said in my past argument about the foreign status and minority of Dominicus and Franciscus, but since it has not yet become clearly known by what law the Fisc claims to break down these defenses,[1] I shall therefore discharge my duty in my reply,[2] believing for a certainty[3] that it will not happen in the present stage of the case that my Lord the Advocate of the Fisc should prepare his arguments, and even reply to ours, without communicating[4] them to me, as happened in the past argument to the very great astonishment not only of myself, but of others also. For he, just as I, should seek the truth solely and be her advocates, just as we are both officers of the State,[5] according to the remarks of Dom. Raynaldus in Observ. part 2, cap. 19, § 1, n. 156. Who indeed desires any other thing than that justice should be administered, and especially when the case concerns the poor in prison? In their case piety[6] should triumph because they are the treasure of Christ, as is well said with reference to our subject by Carolus Petra, super ritibus Magnae Curiae Vicariae, 23, n. 4, about the middle.

[1] quo jure Fiscus praetendat illas elidere; Mr. Hodell translates: "under what law the Fisc pretends that they miss these." [2] satisfaciam in responsione; Mr. Hodell translates: "I will rest satisfied with this response." Spreti means, I think, that having

so far received no answer from the Fisc to his previous argument, he would wait until he had heard from the other side on that point, and then discharge his duty in his reply. Apparently the Fisc made no answer, but Spreti continues the defense in Pamphlet 16, CCXXVII, et seq. See § Nescimus quo, CXXXI, 233, post sec. 35. [3] pro certo. [4] absque eo quod communicentur. [5] Principis. [6] pietas; may be either pity or piety.

AUTHORITIES

Raynaldus, p. 2, ch. 18, § 1, n. 156, says that the advocate and procurator of the Poor just as the advocate and procurator of the Fisc are advocates and procurators of Truth and are so called, as indeed they are State officials, Raynaldus Vota, 87, n. 15. See Queen Elizabeth's remark to Sir Edward Coke: "Attornatus Generalis, qui pro Domina veritate sequitur," in 3 Inst. 79.

SECTION 29.

[SPRETI, PAM. 16, CCXXIX, 232, § ET QUOAD DOMINICUM.]

And as to Dominicus and Franciscus, besides what has been deduced in favor of the others, they are foreigners[1] who are therefore not bound by the Banns of the Governor[2] (by which those other persons are not bound who are not of the district), nor by the Apostolic Constitutions, which prohibit the carrying of arms, as we said in our former argument, §Quae eo facilius [XXXIX, 37, ante sec. 26].

[1] As to the foreign status of these defendants see § Non loquor, CXXII, 129, ante sec. 25, note 1. [2] bannimentis Gubernii, see § Primo quod, CCXXXI, 233, post sec. 36.

SECTION 30.

[SPRETI, PAM. 16, CCXXX, 232, § MULTO MAGIS.]

This is much more so, since Dominicus asserts up to the present time, that he is a minor, just as he has been so described in the record of the proceedings, page 304; and in respect to Franciscus, besides the aforesaid description, of which [we read] in the said proceedings, page 35, we have the

certificate[1] of his baptism, which proves his age conclusively,[2] Buratt. dec. 75, n. 1 and dec. 117, n. 20, part 12 recent.; for he was born on February 14, 1674, from which it follows that at the time of the commission of the crime (which is to be considered with regard to the operation[3] of the punishment, according to the Gloss in l. sciant. v. moritur ff. de legit. haered. [ff. error for Codex 6, 58, 10]; Marsil. in l. Infans. n. 13 ff. ad l. Corn. ad [de] Sicar. [Dig. 48, 8, 12]; and in l. de minore, n. 40 ff. de quaest. [Dig. 48, 18, 10]; Clar. in pract., § fin. quaest. 60, n. 4; Tiraq. de Poen. temper. caus. 7, n. 8; Menoch. de Arbitr. cas. 329, n. 22; Campan. resol. 2, n. 22) he had not yet completed the twenty-fourth year of his age. For to one less than twenty-five years old the penalty should be lessened;[4] l. fere in omnibus ff. de Regul. Jur. [Dig. 50, 17, 108]; l. aut facta, § Persona ff. de Poen. [Dig. 48, 19, 16, 3]; l. auxilium, § In delictis [Dig. 4, 4, 37] and l. si ex causa, § Nunc in minoribus ff. de minorib. [Dig. 4, 4, 9]; cap. Hoc sit positum 26 quaest. 7 [Decretals Part 2, caus. 26, Qu. 7, cap. 8]; Bartol. in l. quid ergo, § Poena gravior ff. de his, qui not. Infam. [Dig. 3, 2, 13, 7]; Marsil. cons. 48, n. 54; Vulpell. cons. 63 [61], n. 10; Prat. respons. Crimin. 25, n. 46; Farinac. qu. 92, n. 41 et seq.; Odd. de Restit. in integr. part 2, qu. 80, n. 72 and many sections following; Baron. de effect. minor. aetat. effect. 10, n. 1 et seq.; Narbon. de aetat. annor. 25, qu. 43, especially n. 6; D. Raynald. observ. par. 2, cap. 14 in Rubr. n. 270 and 274, with the sections following; Thesaur. dec. 161, n. 4, where he criticizes[5] the Judges who follow the contrary practice, and the sections following.

[1] fidem. [2] concludenter. [3] ad effectum. [4] minori etiam * * est poena minoranda. [5] invebit for invehitur; inveighs against.

AUTHORITIES

Rot. Rom. Dec. Recent, part 12, dec. 117, n. 20, as to the effect of a baptismal certificate. "Filiation is not proved by the mere certificate of baptism, by which age not filiation is customarily proved." Burattus, dec. 75, n. 1, is a direct authority. Clarus, in Pract. § Fin. qu. 60, n. 4, cites the Code and Digest as in the text, and says that after one becomes of age he cannot be punished for a crime committed while he was under age and for which he could not then be punished. This would seem to us to be very clear, and yet Tiraquellus de Poenis Temp. caus. 7, n. 8, cited in this section says that while the only authority he found for this was the Gloss of de Marsiliis, he thinks this opinion very true. Menochius de Arbitr, cas. 329, n. 22, and Campana, res. 2, n. 22, are to the same effect. From the stress laid on this point it would seem that Franciscus may have been twenty-five at the time of the trial in 1698, although if he was born on Feb. 14, 1674, he should be just twenty-four. Perhaps his birthday was Feb. 14, 1673-4. De Marsiliis, cons. 48, n. 54; "Et semper minor delinquens mitius punitur, quam major." So Vulpellus, resp. 61, n. 10. The discussions in Oddus, part 2, qu. 80, n. 72, Baronius, Effect. 10, and Narbona Annus vigesimus quintus, qu. 43, are very full. Thesaurus, dec. 161, supports the text. That the penalty is mitigated in the case of one under twenty-five years: Farinacius, qu. 92, n. 41, collects the authorities in support of the affirmative and in n. 42, mentions those who hold the contrary as to minors or persons who have attained the age of puberty. He says that these latter authorities are opposed to the common opinion and adds: "As I, who have had more experience than they in Rome and have also been a judge, can testify according to the actual truth, the following limitations, however, being employed," and then proceeds in his usual manner to mention the numerous exceptions and qualifications.

Raynaldus, part 2, ch. 14, Rubric n. 270, after giving the general rule cites authorities, however, holding that it does not apply in "most atrocious" crimes, and in n. 273, says that in the case of a minor over twenty years though under twenty-five the death penalty is inflicted even when the crime is "more atrocious." The conflict of authorities appears irreconcilable, but Raynaldus inclines to the milder view in n. 287, 288.

SECTION 31.

[SPRETI, PAM. 16, CCXXX, 232, § ET QUIDEM DE NECESSITATE.]

And indeed [this takes place] necessarily,[1] and not according to the discretion of the Judge, because this kind of diminution of the penalty proceeds from a privilege instituted by law,[2] and from an inherent[3] cause which lessens the

crime; Ancharan. qu. 58, n. 3 and 4, lib. 2; Odd. testifying to the common practice in said part 2, qu. 80, n. 93; Farinac. in said qu. 92, n. 163 and 165; Baron. in said Effect. 10, n. 14, where he says that a Judge acting otherwise is held in Syndicatu,[4] and sections following; Sabell. alleg. 6, n. 103 after book 2, summa; Prat. respons. crim. 25, n. 46; D. Raynald. in said cap. 14, in Rubr. n. 288; Thesaur. in said dec. 161, n. 6.

[1] ex necessitate. [2] ex beneficio a jure introducto; Mr. Hodell translates: "by advantage of law that has been passed." [3] intrinseca. [4] in Syndicatu. See Calvinus, s.v.: D'Arnis, syndicare = examinare in alicujus mores vel acta inquirere; syndicari = judicio syndicatorum damnari. This was the remedy given to one who has been injured by a judge's abuse of his judicial powers. For certain grave offenses judges might be removed from office, but in addition, judges were required after the expiration of their term of office to remain in the place of its exercise for fifty days, during which time they might be accused of malfeasance. Cavalcanus, de Brachio Regio, Part 5, contains minute details of the practice. He derives syndicatus from 1 Samuel, ch. 12, where Samuel, after Saul was made King, called publicly on all Israel to witness against him before the Lord if he had defrauded or oppressed any one or accepted a bribe. Angelus (it is said) was held in Syndicatu and spent a year in jail. See as to syndicatus, the consilium of Giacharius, in the Opera Omnia of Julius Clarus.

AUTHORITIES

Ancharanus, book 2, qu. 58, n. 3 and 4, adopts as the correct opinion that a judge is bound to lessen the penalty in the case of a minor delinquent, because it is not a matter within his discretion (arbitrarium) but a causa intrinseca for moderating the punishment. This is approved by Raynaldus, part 2, ch. 14, Rubric, n. 288. Farinacius, qu. 92, n. 163 to 165, reviews the authorities on this doubtful point and concludes that the view, by which the judge is bound to lessen the penalty, is the more commonly received opinion and should not be departed from as to minors under fourteen, and indeed as to those over that age even in the case of "atrocious" or "more atrocious" crimes; but that if they are "most atrocious" you will make no mistake in consulting the Prince, i.e., it is a case for executive clemency. He refers to the case of Bernardo Cenci in n. 108, Appendix 1. This view is followed by Sabellus, vol. 2, Alleg 6, n. 103. Baronius, Effect. 10, n. 14; indeed a Judge is bound of necessity to lessen the punishment by reason of minority, otherwise he makes the case his own, and should be held in syndicatu. Oddus is cited in previous § Multo magis, sec. 30.

Section 32.

[Spreti, Pam. 16, ccxxx, 232, § Licet vero non.]

But although there are not lacking authorities who think otherwise, namely, that the whole matter depends upon the discretion of the Judge, yet our opinion is the truer and the more accepted, especially in case of those crimes which are not the "most atrocious," as in making this distinction is held by Spada, cons. 110, n. 15, lib. 1; Farinac. in said qu. 92, n. 107; Campan. res. 2, n. 26 and 55, and Oril. on that passage n. 3, 6 and 7; and that where the crime is merely "atrocious" or "more atrocious,"[1] the Judge is bound by his official duty[2] to lessen the punishment, is held (besides the authorities just now cited) by Thesaurus in said decision 161, n. 5.

[1] Mr. Hodell translates: "very atrocious," "merely savage" and "more savage." The three grades were atrox, atrocior and atrocissimus as has been explained. [2] necessitate officii.

Authorities

Farinacius, qu. 92, n. 107, discusses this point as he did in his argument in the Cenci case in behalf of Bernardo, cons. 66. Famianus Centolinus in his Additions, copies his criticisms of Vulpell., cons. 101, almost verbatim from this passage of Farinacius. The citations of Campana res. 2, and the observations of Orilia thereon fully sustain the text. Spada, cons. 110, n. 15, merely says that in the most atrocious crimes minority does not deserve indulgence, especially when the minor is over sixteen. He adds that Bernardo Cenci was scarcely more than sixteen, and nevertheless was freed from death, but by the clemency of the Pope and not as a matter of justice.

Section 33.

[Spreti, Pam. 16, ccxxx, 233, § Et quod haec.]

And this opinion[1] applies to the crime of homicide notwithstanding the provisions of the Text in l. si quis te reum, Cod. ad l. Cornel. de Sicar., "if any one shall make you a defendant under the

Lex Cornelia, it is proper that the charge shall be disproved by your innocence and not defended by your minority,"[2] because this provision of the Text should be interpreted in such a way that a minor delinquent is of course not excused altogether, but only is punished more mildly, according to the more ancient authorities collected with a full hand by Farinac. in said qu. 92, n. 112 and the sections following; and the same opinion is expressed by Guazzin. in def. 33, cap. 17, n. 1; Caball. resol. crimin. 134, n. 11; Prat. respons. crim. 25 under n. 48; Paschal. de patr. potest. part 2, cap. 8, n. 22; Thor. compend. decis. part 3, sect. 2; Thesaur. in said dec. 161 especially n. 7; Corthiad. dec. 92, n. 29 and dec. 96, n. 57.

[1] et quod haec sententia. The syntax of this section is awkward.
[2] Mr. Hodell translates: "that your innocence shall defend and purge itself by your minority." Innocence does not need the defense of minority. Adultus = adulescens; see Brissonius, s.v. Adulta aetas was the period from fourteen to twenty-five years.

AUTHORITIES

The views of Farinacius have been cited before. In this qu. 92, n. 108 he certainly collected the authorities with a full hand. Guazzinus, defens. 33, ch. 17, and Caballus, cas. 134, n. 11, are to the same effect. The Gloss on this passage of the Codex quotes Baldus: "adultus homicida tenetur poena legis Corneliae de Sicariis;" and Cujacius and de Marsiliis are to the same effect.

Paschalis, de viribus part 2, ch. 8, n. 22, is an erroneous reference. Thesaurus, dec. 161, is cited previously. Cortiada, dec. 92, n. 28 and dec. 96, n. 57; one less than twenty-five years but over twenty, is not to be punished with death in atrocious crimes as simple homicide, theft, false witness and the like, but with an extraordinary punishment at the discretion of the Judge.

SECTION 34.

[SPRETI, PAM. 16, CCXXXI, 233, § MAXIME QUANDO.]

This is especially so when, as in the present case, the minor did not commit the crime by himself, but in the company of others, for then he is presumed

to be led astray by them, and therefore the ordinary penalty should be diminished[1] more readily; Farinac. in said qu. 92, n. 108 near the end, vers. Et etiam quia; Hector. Faelic. alleg. 36, n. 6, par. 1; Guazzin. def. 33, cap. 17, n. 1, vers. Et late ego deduxi; Thor. vot. 10, n. 16, par. 2; Oril. ad Campan. res. 2, n. 8; D. Raynald. in said par. 2, cap. 14 in Rubr. n. 282, vers. Secus quando, and vers. Et quod ad minorandum; Chartar. decis. crimin. 78 [73], n. 6.

[1] venit minoranda.

AUTHORITIES

Hector Faelicius, alleg. 36, n. 6, is merely a general statement. Farinacius, qu. 92, n. 108, is the case of a youth of sixteen, who was condemned to the galleys for life, because he killed his father by reason of ill treatment. He escaped the death penalty, not only on account of the provocation, but also because he was led to commit the crime by the persuasion of his mother and other persons. But it is added that if he had been over sixteen, he would not have deserved this indulgence. Guazzinus, def. 33, ch. 17, n. 1 (before cited) is not much in point, as it concerns the case of a youth of seventeen, who misbehaved with a nun, it being shown that she had solicited him. Raynaldus, part 2, ch. 14, Rubric 282; "otherwise when they offend at the instigation, or the advice or in the company of others, because then, since they are not considered of mature age, they are presumed to be led to commit crime from the persuasion of their companions."

Chartarius, dec. 73, is a remarkable case of a girl of sixteen, accused of witchcraft and heresy, who confessed that when she was five years old she was induced by her mother to abjure God, and after the mother died her ghost appeared one night accompanied by many demons, to one of whom the girl was betrothed with a ring, and that by her mother's command she killed two boys and committed other evil deeds with the aid of the demon who was her constant companion from the time of her betrothal. As it appeared that the accused was under twenty-five, and had been misled by her mother she was sentenced to be placed in a monastery at the pleasure of the Archbishop and Inquisitor, there to do penance.

SECTION 35.

[SPRETI, PAM. 16, CCXXXI, 233, § NESCIMUS QUO.]

We do not know in what direction the Fisc may attempt[1] to turn in order to destroy these

fundamental principles of law,[2] because my friends who represent the Fisc,[3] neither in their former nor in their present argument, have made any discussion[4] about the matters aforesaid. If at any time[5] indeed they should attempt to break down this defense of ours with the Statute of Florence, book 3, rubric 33, providing in what way a delinquent less than sixteen years of age[6] is punished in criminal cases, many answers are at hand.

[1] praetendat. [2] hisce juridicis fundamentis; Mr. Hodell translates: "for the destruction of these foundations in law." [3] Domini mei agentes ipsius partes. [4] nec quidquam motivarunt. Probably for motiverunt, from motiri; see DuCange. D'Arnis gives as equivalent, déclarer, expliquer. [5] quotiescumque. [6] minor 16 annis, Mr. Hodell translates: "a minor of sixteen years."

See as to this Statute of Florence, Caballus, cas. 134, n. 11.

Section 36.

[Spreti, Pam. 16, ccxxxi, 233, § Primo quod.]

In the first place, because the purview[1] of this statute does not extend to crimes committed outside of the territory[2] of the said city, but the place of the crime, and the statutes thereof, should be regarded. Then the latter statutes have really no application,[3] as in the present case they have none, because the Banns of the Governor of this City[4] have no place[5] when the question concerns the punishment of foreigners, on account of the lack of jurisdiction of the Prince or official who promulgates them, according to the authorities cited in my former argument, § Quae eo facilius [xxxix, 37, ante sec. 26] and the sections following. In such case the delinquent ought to be punished according to the common law;[6] Bartol. in l. cunctos Populos n. 49 and 50, and Baldus also on the same, n. 45 et seq. Cod. de Summa Trinit. et Fid. Cathol.

[Codex 1, 1, 1]; Farinac. fragm. crimin. par. 1, Letter D, n. 107.

[1] dispositio. [2] territorium; the land around a town or city. [3] cessantibus, cessant. [4] bannimenta hujus Gubernii. It is not clear whether gubernius is used for gubernator, or gubernatio, see Glossary. [5] locum non habent. [6] Jus commune.

AUTHORITIES

Farinacius, Frag. Crim. Litt. D., n. 107, under Rubric, "Delicta secundum quae statuta punienda sunt?"; "offenders should be punished not according to the statutes of their place of origin or domicil, but according to those of the place where the crime is committed, and when these have no application, according to the common law, for thus I understand the doctrine of Bartolus." (Bartolus in l. cunctos Populos, n. 49, C. de summa Trinit. et fide Cathol. Codex. 1, 1, 1.) That is, these defendants could not be punished under the Florentine statute, because their crime was committed in Rome; and the Banns had no application because they were foreigners, therefore they were liable only under the common law.

SECTION 37.

[SPRETI, PAM. 16, CCXXXI, 233, § SECUNDA RESPONSIO.]

The second answer is that the statute says nothing more than that one under sixteen years[1] cannot be punished with the ordinary penalty of the crime, consequently it should take effect in that case;[2] but when the question concerns a minor over the said age, but less than twenty-five, the rule should be drawn from the common law, by which the said statute in such a case receives a strict interpretation,[3] as on the point of this very statute Marcus Asin. advised inter Stat. crimin. divers. in fol. book 2, cons. 110, n. 12, and is followed by Caballus resol. crim. in said cas. 134, n. 11 at the middle, where he testifies that he has seen it applied in practice in lessening the penalty for one less than twenty-five years but more than eighteen,[4] and in the case of other similar statutes

opinions are given by Ancharan. qu. 58, n. 5 et seq.; Boss. tit. de confess. n. 69, vers. Consideratio tamen.

[1] minor annis decem et sex, Mr. Hodell translates: "a minor of sixteen years." [2] operari debet in hoc casu; i.e., should apply to that case only, Mr. Hodell translates, "in our case." [3] passivam interpretationem. [4] minori annis 25 majoritatem decem et octo. I read for majoritatem, majori autem. Mr. Hodell translates: "Caballus testifies that he saw it so practised in diminishing the penalty to one less than twenty-five years, that is to one who was eighteen years old."

AUTHORITIES

Caballus, Resol. Crim. cas. 134, n. 11, refers to a statute of Florence by which the age of eighteen is said to be considered as if it were twenty-five in cases of crimes. He quotes the opinion of Marc. Asinius, cons. 110, that notwithstanding this statute one less than twenty-five, but over eighteen years, is to be punished according to the common law, because the statute does not say that one older than eighteen is to be punished as one over twenty-five, although it directs that the punishment is to be mitigated up to eighteen and goes no further. He also refers to Hypp. Riminaldus, cons. 135, an erroneous reference. There appears to be a discrepancy as to the ages of sixteen and eighteen in the Statute of Florence as stated in the O. Y. B. by Spreti and as recited in Caballus. I have not been able to find the statute referred to.

SECTION 38.

[SPRETI, PAM. 16, CCXXXI, 234, § TERTIA DENIQUE.]

Finally, the third answer — and one which lays the axe to the root of the tree[1] — is that this defendant is not of the city of Florence, nor of its territory,[2] but of the territory[2] of Arezzo; but the city of Arezzo and its environs[3] are not bound by the statutes of the Florentines, because in the first place, they are not subject to the city of Florence, but are [merely] under its protection,[4] as on this point Soccinus Senior advises, cons. 7, especially n. 2 and the four sections following in vol. 1, and cons. 74 (which is by his son Bartholomaeus) under n. 8, in the same first volume, where the latter

says that the preceding opinion of his father is endorsed by that strict expounder of the law, Thomas Docius of Siena. And in the second place, because the city of Arezzo has its own statutes; Soccin. Sen. cons. 7, n. 7, vol. 1.

[1] quae ponit falcem ad radicem. [2] territorio. [3] comitatus, county. [4] non sunt subditi sed recomendati, Mr. Hodell translates: "they are not called subjects but vassals."

AUTHORITIES

Socinus Senior, cons. 7, appears to sustain the text. He explains at some length the relation between Florence and Arezzo.

SECTION 39.

[SPRETI, PAM. 16, CCXXXII, 234, § RECURRITUR ENIM.]

For recourse is had to the statute of a ruler city, when other subject cities do not have their own statutes, but it is otherwise if they do have them, according to the Text in l. de quibus 31 [Dig. 1, 3, 32], and thereon Baldus in n. 6 and Castrensis n. 2 at the end, vers. Patet etiam ff. de legib.; Soccin. cons. 7 in said n. 7, vol. 1; also Castr. cons. 129, n. 1, book 1; Gabr. cons. 29, n. 47, book 2; Mendos. in addit. ad Roman. cons. 218 about the end; Rot. coram Coccin. dec. 1451, n. 6, and coram Dunoz. Jun. dec. 937, n. 18 and in Rec. Dec. 107, n. 17 et seq. part 15.

AUTHORITIES

Paulus de Castrensis, book 1, cons. 129, n. 1, in rubric: A subject city should be ruled by the statutes of the city to which it is subject unless statutes of its own have been confirmed. And when they are different, its own statute is followed. He instances statutes of Pisa and Florence. S. Rotae Romanae, Decis. Recent., dec. 107, n. 17, a decision in 1667, "the special statute of a place should be followed rather than the general law of the Province."

Horatius Mandosius, in his note to Ludovicus de Ponte (Romanus), cons. 218, says "although dependent cities (loca inferiora) should be

governed by the laws of their superiors, yet this is understood to be provided that they do not have special statutes of their own." He is also speaking of the statutes of Pisa and Florence. Gabrielius, book 2, cons. 29, n. 47; where there is a general statute, and also a special statute, the latter is followed. Dunozetus (Amatus), dec. 937, n. 18, is to the same effect.

Section 40.

[Spreti, Pam. 16, ccxxxii, 234, § Itaque sunt.]

And so [if] they are contrary or inconsistent;[1] Gratian. discept. 9, n. 25; Rot. coram Dunoz. jun. in said decis. 937, n. 19 et seq. and in said decis. 107, n. 19 and the three following, Part 15 Rec.

[1] simul incompatibiles; incompatible together; Mr. Hodell translates: "And so they are contrary or incompatible."

Authorities

Gratianus, discept. 9, n. 24 and 25: "Where there is no statute of a particular place, then recourse should be had to that of the superior state, because when the members do not have their own laws, then they have recourse to the head. The objection is less when statutes of this sort are mutually compatible, in which case the provisions of both statutes can be adopted." De Luca in his notes on this passage approves it, and cites other authorities. Rotae Recent. dec., part 15, dec. 107, n. 19, was the case of a transaction with minors not recorded, as required by a statute extending over the Ecclesiastical State, but conforming to the statute of Ravenna which prescribed its form, and this statute was held to govern.

Section 41.

[Spreti, Pam. 16, ccxxxii, 234, § Cujusmodi esse.]

Of what nature the statutes of the city of Arezzo are, in respect to the others of the city of Florence, is shown by Soccin. Sen. in said cons. 7, n. 7, vol. 1, and it is evident from the Rubric de oblig. minor., where it is commanded that those under twenty-five years are not bound without certain formalities, upon which Rubric Paulus de Castrensis gives his opinion, cons. 124, book 4;

for from this statute it is clear enough that in the said city and its environs[1] minority is regulated by the common law.[2]

[1] ejus comitatu. [2] minor aetas regulatur a jure communi, i.e., a less age than twenty-five, or minority. Mr. Hodell translates: "a less age is the rule according to common law."

AUTHORITIES

Horatius Mandosius, addition to Ludovicus de Ponte, cons. 218, says that the common law (jus commune), unless something else is added, is understood to mean jus Romanorum.

SECTION 42.

[SPRETI, PAM. 9, CXXXVIII, 143, § QUOAD BLASIUM.]

As to Blasius Agostinelli we have amply written in our prior argument; since he has not been examined[1] anew, (and in his former examination he confessed merely that he was present at the said homicides, but that he had not put his hand to them,[2]) it follows that the rigorous opinion of Caballus can in no wise apply to him, Resol. Criminal. cas. 300, n. 73, who says that auxiliaries of this kind are not exempt from the penalty of homicide whenever[3] they kill anyone with their own hands — although the opinion of this author was shown by us to be erroneous in our prior argument, § Quidquid in contrarium, XXXVIII, 37, ante sec. 14.

[1] constitutus. [2] non autem manus apposuisse. [3] quoties-cumque.

SECTION 43.

[SPRETI, PAM. 16, CCXXIX, 232, § FACILIUS VERO.]

This is in truth the easier with respect to Blasius Agostinelli who has in no wise confessed that he killed or wounded anyone, but that he was

merely present, as we have shown[1] lately[2] in our argument, § Quoad Blasium, CXXXVIII, 143.

[1] perpendimus; shown or considered with care, Browning's word "perpend." [3] praeventive.

Section 44.

[Spreti, Pam. 16, CCXXXII, 234, § Quatenus vero.]

So far indeed as the Fisc may have other grounds [for his argument] which, by our feeble judgment we have not been able to divine, I pray that they may be courteously imparted to us, that the poor accused minor may not remain undefended.[1]

[1] remaneat; see Glossary. Spreti again alludes to the alleged failure of Bottini to furnish briefs of his argument, see § Voluissem etiam, CXXXVIII, 143, ante sec. 28.

Section 45.

[Spreti, Pam. 2, XXXIX, 37 § Et haec sunt.]

And these are the matters which, under stress of extreme brevity of time, I have been able to collect in the discharge of my duty for the defense of these poor prisoners, by no means despairing that my Lord Judges, when they perceive that too little has been said, will supplement and extend it out of the supreme uprightness in which they are so eminent, thus conforming with the decree of the Emperors Diocletianus and Maximianus as reported in leg. unica C. ut quae desunt advoc. [Cod. 2, 10], and following the advice of Hippolytus Marsiliis, the distinguished criminalist,[1] who says that a Judge is bound by the duty of his office[2] to search for defenses in behalf of the accused, in Pract., § nunc videndum n. 7, and in § sequitur

n. 43, and in § occurrunt, under n. 3, vers. Et non solum.

[1] criminalistae; authority on criminal law. [2] ex officio.

AUTHORITIES

Codex 2, 10; Non dubitandum est judici, si quid a litigatoribus vel ab his qui negotiis adsistunt minus fuerit dictum, id supplere et proferre, quod sciat legibus et jure publico convenire: A judge should not hesitate if anything has been omitted by the litigants or by those who assist them in their business, to supply and bring out whatever he may know to be agreeable to the law and public justice.

Hippolytus de Marsiliis (dei Marsigli) was born in Bologna in 1450 and died in 1529, having as he said in cons. 115, n. 30, studied law for sixty years. He taught law in Bologna, was Governor of Alberga, near Genoa, and became Vicarius of the Duke of Milan. He made a special study of torture, and invented the original form of the Vigil. In Esmein, Continental Legal History Series, he is styled "of Marseilles." The latin name of Marseilles, however, is Massilia. I think he was so called from Marsiglia in the province of Cuneo, N. E., of Mondovi. Few jurists of the time exerted a greater influence.

CHAPTER XII

THE CLAIM OF THE CONVENT OF THE CONVERTITES TO POMPILIA'S ESTATE AND THE FINAL DECREE

The Convent of S. Maria Magdalena was founded by Leo X, in 1520, by his Bull 39, 1 Mag. Bull. 611, for the reformation of dissolute women, ab inhonesta vita ad honestam se convertentes, and hence was familiarly called the Convent of the Convertites. Browning confuses this convent with that of La Scaletta throughout The Ring and the Book. The Convertites were placed under the direction of the Archfraternity of Charity, which was entitled to receive the property of women of this class, who died intestate, or of such of them as did not bequeath a fourth (or fifth) part of their estates to the convent. The Bull of Clement VII, Const. 14, A.D. 1525, 1 Mag. Bull. 665, confirmed the former Bull, and added sundry regulations; the Bull of Innocent X, which does not seem to be included in the Magnum Bullarium, increased the proportion to one-third, and Clement X, by his Bull 22, 5 Mag. Bull. 519, A.D. 1670, recited the disregard of the prior Bulls and re-enacted them. An epitome of the law is given by Scanarolus de Visitatione Book 1, § 3, cap. 4, n. 32. See also an account of the convent in Pietas Romana 34, taken from Amydenus.

On Pompilia's death the convent of the Convertites asserted its rights against her estate. She could not indeed be included among the

meretrices to whom the Bull principally related, but those women were also mentioned who were styled incontinentes, so the Convertites would have a technical claim, although it was not within the evident purpose of the law. It will be observed moreover that Lamparelli was the Procurator of Charity, and thus in a way represented the Archfraternity which had the oversight of the Convertites. Having, however, been procurator for Pompilia and Caponsacchi in the Prosecution for Elopement, he continued to represent her in this subsequent phase of the case.

Raynaldus, in commenting on these Bulls, Obs. cap. 24, § § 33 to 46, n. 47, expresses the opinion that they should be revoked. He says he knows what he is talking about as he was Procurator Pauperum, and daily saw such prosecutions brought to the prejudice of the honor and reputation of deceased women, with no resulting benefit to the convent. Lamparelli doubtless had the sympathy of the court, and his argument now follows. It is based apparently upon the briefs of Bottini; much of the phraseology is identical, and the same authorities are cited with very few additions. As Lamparelli argued in the Processus Fugae, and it appears that his brief was printed, it is possible that Bottini in Guido's case made use of Lamparelli's argument, but if so, he doubtless amplified it. However, from the internal evidence afforded by comparison, my conclusion is that Lamparelli in this argument copied most of it from Bottini.

THE ARGUMENT OF LAMPARELLI IN BEHALF OF POMPILIA'S REPUTATION, AND THE DECREE OF FINAL JUDGMENT THEREON

Section 1.

[LAMPARELLI, PAM. 17, CCXLIII, 241, § IN CONTENTIONE.]

During the contention most zealously and learnedly carried on between my learned friends the Advocate and the Procurator of the Poor, and the Fisc, in the Case of Homicides committed by Count Guido Franceschini with his hirelings,[1] upon the person[2] of Francesca Pompilia his wife, and of Pietro and Violante de Comparini his wife, I refused[3] to descend into the arena, lest I might seem to deviate from the duty which I discharge in common with the said counsel for the defense.[4] And my silent pity also granted delay and conceded time, for I believed it would too greatly prejudice the said Guido[5] and his companions, imprisoned on such a charge,[6] for whose excuse the causa honoris especially presented itself, if I had then been willing to proceed with the defense[7] (long ago entrusted to me) of the chastity and honor of the said Francesca Pompilia, whose mind, tenacious of her marriage obligation, had never been stained by the infamy of impure lust,[8] and with whom her suspicious husband could have found no fault, had not the murder of his wife occurred, — just as if he had wished to prove her adultery from this fact alone, that he could then kill his wife, and that he killed her in order that she might be believed to be an adulteress.[9]

[1] per conductos homines; Mr. Hodell translates: "persons led."
[2] in personam. [3] Mr. Hodell translates: "In the contention

* * I refuse." [4] cum eisdem DD. Defensoribus. The functions of Lamparelli as Procurator Charitatis and those of Archangeli as Procurator Pauperum were similar and overlapping. [5] His premature action would naturally prejudice Guido, because as Procurator of Charity he would of course be a colleague of Archangeli. Lamparelli it will be remembered must have represented Pompilia in the Prosecution for Elopement, in which the Fisc opposed him. [6] pro tali reatu. [7] prosequi defensam. [8] A difficult sentence: "cujus teneram conjugii mentem nulla unquam impurae libidinis aspersit infamia." I would read tenacem, as misprinted teneram. If conjugii is a misprint for conjugis the passage might be translated: "the tender mind of whom as a wife has never been stained," etc. [9] The meaning of this awkward sentence is apparently that if Guido had not killed his wife (and thus stood in need of an excuse), he would not have charged her with adultery, or else that he made the charge in order to have an excuse for killing her. Perhaps ex hoc should be translated "for this reason."

Section 2.

[Lamparelli, Pam. 17, ccxliii, 241, § Modo autem.]

But now since the case has been definitely brought to its most fatal end[1] in respect to all the prisoners (for thus the matters are concluded that should never have begun), I renew the battle over that most unhappy question, and assert with the utmost confidence, both from what I have fully elaborated in my argument[2] about the refutation[3] of the alleged abduction,[4] here by your favor to be renewed,[5] and also from what has been even more augmented by my most illustrious friend the Advocate of the Fisc in his very learned arguments,[2] divided in the two presentations of the case, [I assert, that is] that the memory of the aforesaid Francesca Pompilia should be absolutely freed from the crime of adultery unjustly and too bitterly fastened[6] upon her by her husband, and that it should be declared by a definitive decree

that she has not violated her marriage vow. And this I say in spite of the fact[7] that such a legal claim[8] may seem inconsistent,[9] for although all crimes cease by death as, according to the Text in l. Defuncto, and the Gloss thereon, with the authorities, ff. de public. delict. [l. accusatore defuncto ff. de public. jud. Dig. 48, 1, 13], and in l. Senatus consultus, § Si propter. ff. ad Tertullian. [Dig. 38, 17], and in cap. Quorundum distinc. 22 [Cod. 9, 47, 22 ?], is held by Eugen. cons. 21, n. 2; D. Canonicus Rainald. in Syntax. rer. criminal. book 1, cap. 2, § 1, n. 75, vers. Et quando reus, and book 2, cap. 23, § 1, 2 and 3, n. 234; Carpzov. in prax. criminal. book 3, qu. 141, n. 1; nevertheless whenever the crime is "atrocious," and of such nature that it involves the indelible stain of infamy, its memory ever endures, and therefore it concerns the principal party in this case[10] to vindicate the reputation of his benefactor[11] from the asserted crime of adultery, as is most excellently held by Eugen. cons. 21, n. 5, about the middle; Peregrin. de Jure Fisc. book 4, tit. 5, n. 35, where we read: "The thirteenth case is when the heirs of the deceased, in order to purge the infamy which operates publicly against the deceased on account of some crime, desire, in order that his innocence may be defended, that a judicial examination[12] may be made concerning the crime itself, for this is granted by law to be made;" Boss. tract. criminal. tit. de poenis n. 34, near the end, where we read: "And note in general that although death takes away the penalty, yet the heir of the deceased may, for the sake of his reputation and honor, urge[13] that a public declaration be made concerning the crime;" Caball. resolut. criminal. cas. 298, n. 30, where we read, that "although by the death of the criminal,

the crime is extinguished so far as his own person is concerned, nevertheless the heirs of the defendant may, in behalf of their own interest, and to clear away the infamy of the deceased, demand that the case proceed to judgment, and that it be judicially declared that the deceased has not committed the crime;" and he shows this in the sections following.

[1] remansit terminata; auxiliary use of remanere. [2] informatione * * allegationibus; Lamparelli probably alludes to an argument made by him in the Prosecution for Elopement. See similar references in § Nec ad hujusmodi, CCXLV, 242, post sec. 4; § Et licet, CCL, 246, post sec. 13; and in Spreti's argument, § Tanto magis, CXXXIII, 139, Ch. VIII, sec. 61. [3] super exclusione. [4] raptus; Mr. Hodell translates, "rape." [5] ex gratia reassumenda; Mr. Hodell translates: "which is reassumed gratuitously." [6] animose impicto * * crimine; see Glossary, s. v. impingere. [7] absque eo quod. [8] talis instantia; Mr. Hodell translates, "insistence." [9] incongrua. [10] that is Tighetti, the heir beneficiary and successor under Pompilia's will, now the principal party or actor in this litigation. [11] auctricis; authoress, as the person who was author or origin of Tighetti's rights. Auctor, one who promotes the welfare of another, a benefactor. [12] quod cognoscatur. [13] instare; in its technical sense, to bring an action.

AUTHORITIES

The ordinary rule as stated by Carpzovius was that death extinguished the delict, and the criminal answered for his crime before God. Where the consequences of his act might endure after his death, as in cases of confiscation of property, etc., the case might proceed to its end. There had been no final decree in the Processus Fugae against Pompilia.

SECTION 3.

[LAMPARELLI, PAM. 17, CCXLIV, 242, § ET QUIDEM.]

And indeed this is not without manifest reason, for just as the Fisc is permitted to proceed further in the trial of a crime perpetrated in the lifetime of the deceased, even to the judicial condemnation of his memory,[1] as in accordance with the Text in l. 6 C. ad l. Juliam Majest. [Cod. 9, 8, 6] and in l. final.

ff. eod. [Dig. 48, 5, 7] and in § 3, Institut. de public. judic. [Inst. 4, 18, 4], is held by Eugen. in cited cons. 21 throughout; D. Canonicus Raynald. in said cap. 2, § 1, vers. Et quod dictus Reus, and vers. Et hoc in casu; so likewise it cannot be denied to[2] the party principal as the heir beneficiary[3] and successor of the said Pompilia and of Pietro Comparini,[4] that since her innocence is evident, he may demand that a decree acquitting her should be entered in the suit,[5] since in other cases[6] any one who pleases may be permitted to defend the deceased, as is advised by the Gloss on cap. Damnationis 24, quaest. 2 [Decretum Part 2, caus. 24, qu. 2, cap. 5], and l. Servum quoque ff. de procur. [Dig. 3, 3, 33]; Penia [Pegna] ad Emericum in direct. Sac. Inquisit. part 3, comment. 92, vers. Haec accusatio, and vers. Ne quis autem; Decian. tractat. crimin. vol. 1, book 5, cap. 57, n. 10; D. Canonicus Raynald. in the cited cap. 2, § 1, n. 75, vers. Et hoc in casu, about the middle.

[1] Mr. Hodell translates: "for the purpose of damning his memory." [2] denegari non potest Principali; Mr. Hodell translates: "denied by the principal himself." [3] haeredi beneficiato. [4] Pietro's connection with this question probably arises from the bequest in his will to Pompilia, who survived him, CLVII, 161. [5] quin instet pro sententia absolutoria reportanda. [6] alias, that is, in other cases according to the authorities.

AUTHORITIES

Decianus, Tract. Crim., vol. 1, Book 5, ch. 57, n. 10. This chapter concerns the condemnation of the memory of heretics, whose property in that event was taken from the heirs. In such proceedings any one, even if not a son or heir but a stranger, is permitted to defend the accused, and if no one appears in answer to the citation, the Judge, ex officio, appoints defenders. To the same effect is Pegna's commentary on Eymericus Directorium Inquisitorum 92. The Glosses on the Decretum and Digest do not appear important. The younger Pliny in his Letters, Book III, 9, mentions a prosecution of a provincial Governor which was continued after his death, by a revival of the ancient procedure, then long in disuse.

Section 4.

[Lamparelli, Pam. 17, ccxlv, 242, § Nec ad hujusmodi.]

Nor in order to impede such a decree does the elopement deserve to be a second time adduced in argument, which was taken by Pompilia in company with the said Canon Caponsacchi, with whom in the tavern at Castelnuovo she was delivered to jail; for besides that it would be sufficient in order to remove the force of that to mention the judgment of this most Illustrious Congregation,[1] entered on February 18th last past, against Guido Franceschini, in accordance with which he was publicly executed on the following 22nd, notwithstanding that to escape the penalty of uxoricide he insisted solely[2] upon her asserted adultery which was alleged to appear[3] from her aforesaid elopement from his home; — [besides the above] every suspicion whatsoever of her infidelity disappears because of the defenses then made, and from the Prosecution [for elopement] itself there is apparent a very just reason on account of which this most wretched wife attempted to seize upon this method of escape from her husband's home, not indeed for the sake of satisfying her passion with her alleged lover, but that she might go back to her own paternal home and there live with her parents a safe and decent life. And this reason is in truth very well shown, not merely[4] by the notorious quarrels that immediately arose (after her arrival at the City of Arezzo along with Pietro and Violante de Comparini in fulfillment of the agreement included in the marriage contract) on account of their straitened domestic circumstances,[5] so that they were forced after a few

months to return to the City, not without the greatest distress by reason of the discovery of Guido's deception, as appears from the letters of the Abate Paolo Franceschini, which take for granted[6] the complaints resulting from said deception, and especially from the letter dated March 6, 1694, where we read: "I write again to you that I do not wish to imitate him in his manner of writing, not being of his mind to sow broadcast in my letters, such words as would well merit response by deed and not by words. And these are so offensive that I have kept them for his reproof and mortification." And further on: "So that if you give trouble, which I will never believe, you yourself will not be exempt therefrom;"[7] and from other letters reviewed in my former argument, and especially § Videns igitur, with the sections following.[8] And although this does not disclose the nature[9] of the dispute, yet since the Abate Paolo has not shown the letters written to himself, the presumption weighs very heavily upon him that the complaints were just, and the cause was true on account of which the complaints and quarrels arose, as in very similar circumstances[10] has been affirmed by the Rota in the Roman or Neapolitan case of Liberatio a molestiis,[11] February 27, 1690, § Eo magis, before the most Eminent Archbishop of Milan, and in the Roman case of Pecuniaria super Exhibitione,[12] June 21, 1694, § Clarius, before the Reverend Father in God Muto.[13]

[1] The congregation of the Governor which pronounced sentence upon Guido. [2] unice. [3] resultare. [4] nedum, correlative with Verum etiam, the first words of the next section. [5] angustiam rei familiaris. [6] praesupponentibus. [7] This letter does not appear in the O. Y. B. [8] Unfortunately the former argument of Lamparelli has not been preserved. [9] qualitatem.

[10] in proximis terminis. [11] Relief from suits or threatened suits. [12] Action of accounting. [13] R. P. D. Muto.

These extracts from the letters of Abate Paolo are contained in Bottini's argument, Pam. 6, § Et quidem, LXIX, 75, Ch. VI, sec. 63, and the authorities are cited by Bottini in the sections following § Et licet ipse, LXX, 76, Ch. VI, sec. 64.

Section 5.

[Lamparelli, Pam. 17, CCXLVI, 243, § Verum etiam.]

[Not only was the above a cause of Pompilia's elopement], but also[1] a very bitter lawsuit was carried on by Pietro Comparini about the nullity of the dowry contract, and the proof[2] of the substitution of a child made by Violante the mother, not only to deceive her husband but also to keep off his creditors, who were pressing him hard at the time; and since the dowry included all the property and the entire patrimony of Comparini, of no little value considering the station in life of these persons, the controversy (carried on by the father-in-law concerning a considerable sum[3] which, as experience continually teaches us, generally produces implacable hatred and most violent enmity, as is held by Grammat. cons. 46, n. 4; Cravett. cons. 75, n. 11; Soccin. Junior cons. 73, n. 14, vol. 2; Decian. tractat. crimin. book 3, cap. 25, n. 56; Vermigliol. cons. 321, n. 5; Farinac. qu. 49, n. 2) produced an effect of this kind upon this hapless wife, so that her love for her husband, long since disturbed by their preceding quarrels, had become entirely extinguished,[4] so and to such extent that she found herself very often placed[5] in peril of her life, because of the severity of her husband who threatened her sometimes with insults, sometimes with his pistol,[6] and just as

these[7] perils, it cannot be doubted, were most apt to strike with fear even as steadfast a man as you please, as is advised by Alex. cons. 156, n. 4, book 5; Cepoll. cons. 2, n. 5; Paris. cons. 60, n. 3, book 4; Mascard. de probat. book 2, conclus. 1051, n. 49; Menoch. de praesumpt. book 3, praesumpt. 4, n. 8; Boer. decis. 100, n. 13; Rot. after the second volume of the consilia of Farinacius, dec. 260, n. 10 and 11; so,[7] much more should it be affirmed in the case of Francesca Pompilia, a girl of tender age, entirely destitute of all help, away from her paternal home, and in the absence of her parents, as is held by Menoch. cons. 1, n. 290, book 1; Cravett. cons. 114, n. 3, book 1; Cepol. cons. 221, n. 4 and 8; Mogolon. de met. cap. 2, § 6, where it is said that the mere sight of arms, although he who has them does not use them or unsheath them, is just cause for producing[8] fear, and § 7, n. 15, where he considers the absence of blood relatives as a cause for exciting fear; D. Canonicus Raynald. vol. 3, cap. 25, § 4, n. 34, where he says that it is sufficient to see the signs or acts of manifest intention or preparations.[9]

[1] verum etiam, correlative with nedum in the preceding section. [2] probationis suppositionis partus; misprint for probatione. [3] considerabile quantitate. [4] penitus extinctus remanserit. At this place in the O. Y. B. there is a MS. marginal note, "Et tamen mulier evasit gravida paulo ante fugam;" "and yet the woman became pregnant a little while before her elopement." [5] se constitutam viderit. [6] igneo breviori sclopulo. [7] sicuti; correlative with ita, following the citations. [8] productiva. [9] praeparamenta.

The argument as to the effect of a lawsuit, and the authorities are taken from Bottini, § Justior enim, LXXI, 78, Ch. VI, sec. 71, and § Verificationes, CLXXIV, 180, Ch. VI, sec. 70; the argument as to the effect of fear, and most of the authorities, from Bottini, § Adeoque cum, LXXI, 78, Ch. VI, sec. 72.

Section 6.

[Lamparelli, Pam. 17, ccxlvii, 244, § Ac propterea.]

And therefore since so many relevant circumstances concur,[1] on account of which Pompilia was led to desert her husband's bed by taking flight, every suspicion whatever of her infidelity and violation of her marital faith[2] is utterly excluded;[3] for whenever we have two causes of which one is lawful and permitted, but the other is wrong and detestable, that one should in general be adopted[4] by which the crime is entirely[5] excluded, as in accordance with the Text in cap. In poenis, de regul. Jur. [Sexti Decretal. 5, tit. 12, reg. 49], and in l. interpraetatione 42 ff. de poenis [Dig. 48, 19, 42] is advised by Bald. in l. 1, n. 10, Cod. de ser. fugit. [Cod. 6, 1]; Censal. in l. unica, § 1, n. 36, vers. Quod si plures extiterint causae, C. si quis Imperatori maled. [Cod. 7, 1]; Honded. cons. 105, n. 60, book 1; Cravett. cons. 8, n. 2, and cons. 319, n. 1; Andreol. contr. 66, n. 24; Mascard. de probat. concl. 814, n. 8, vol. 2; Conciol. allegat. 87, n. 24; Rota Januen. voto 11, n. 5 and 6, after Censal. in said l. unica.

[1] concurrentibus tot relevantissimis circumstantiis. [2] conjugalis violatae fidei. [3] exclusa remanet. [4] venit amplectenda. [5] penitus.

The authorities are taken in general from Bottini, Pam. 6, § Reditus ad urbem, lxx, 77, Ch. VI, sec. 65.

Section 7.

[Lamparelli, Pam. 17, ccxlvii, 244, § Absque eo quod.]

This is so, notwithstanding the argument on the other side[1] that such lawful cause has been

excluded,[2] not only [first], by the letter written by Francesca Pompilia to the Abate Paolo,[3] in which, after returning her thanks to him[4] because he had united her in marriage to his brother, she accused her parents of having instilled in her mind their most evil advice of destroying the entire household, and of going back to the City with her lover, and [said] that she was leading a peaceful and quiet life through their departure; but also [secondly, that such lawful cause is excluded] by the companionship of the Canon Guiseppe Caponsacchi, with whom she took her flight, by reason of which he was banished[5] to Civita Vecchia for three years.

[1] absque eo quod. [2] exclusa remaneat. [3] LV, 56. [4] eidem. [5] relegatus.

Section 8.

[Lamparelli, Pam. 17, ccxlvii, 244, § Nam quoad assertam.]

For [first] whatever may be the case with regard to the alleged letter,[1] whether the explanation[2] added thereto by the said Pompilia in her examination has weight,[3] and should be considered probable or not, — namely, that her husband had traced out the letters and that these had been marked with ink by her drawing a pen over them, because[4] she herself did not know how to write, — [however this may be] it is certain that if the letter be carefully read, it will be utterly impossible to maintain that it had been written by one whose mind was balanced.[5] For who can be found, so unmindful of filial love and of reverence towards parents,[6] as to persuade himself[7] that this delicate girl, at the time[8] not more than fourteen years old (as appears from the certificate[9] of her baptism given in the Summary of the Fisc in the second

presentation of the case, No. 2[10]), away from her paternal home, still grieving over the very recent departure of her parents, and very badly treated in her husband's home (as is clearly shown by her continual complaints, and her recourse made not merely to the Very Reverend Bishop, but also to my Lord the Deputy Governor[11]), could have laid these detestable charges against her parents,[12] and even informed her husband's brother of them, who was most hostile[13] towards her, unless, as she herself[14] frankly confessed in her testimony, she had been forced to do so by her husband whom she could by no means resist, without very evident danger of death on account of his excessive severity to her, which she had very often experienced before.[15] And as this improbability is apt[16] to strike the reader with horror, so likewise it shows very plainly that the letter was not written voluntarily, but under compulsion, as is observed by Farinac. cons. 22, n. 34, before the middle, book 1, and cons. 60, n. 31 at the end; Caball. resolut. crim. cas. 199, n. 36, where he says that what no sane mind would approve should not be admitted; Vermigl. cons. 3, n. 6 and 7. Nay more, that excessive caution in extorting the said letter from his wife evidently proves his own bad faith,[17] and that the same had been procured by trickery,[18] in order to quiet the mind of his brother the said Abate, who, being annoyed by continual complaints about Guido's bad treatment of his wife, was unremitting in finding fault[19] with Guido about it; as in a similar case is observed by Cassan. ad Consuet. Burgund. page 2 in my copy n. 13.

[1] in Summary, Pamphlet 4, LV, 56. [2] qualitas. [3] subsistat. [4] ex quo. [5] aequo animo. [6] MS. note in margin of O. Y. B. opposite the word parentes: "qui negaverant se esse tales,"

"who had denied that they were such." [7] ut sibi metipse persuadeat; to persuade his very self. [8] tunc temporis. [9] ex fide. [10] CLV, 159. [11] commissarium. [12] contra genitores detestabilia crimina impingere; see Glossary, impingere. [13] insensissimum; perhaps, unsympathetic. [14] ipsamet. [15] praecedenter. [16] apta. [17] arguit in ipso dolum. [18] affectate. [19] quotidie redarguere non cessabat d. Guidonem.

This argument and the authorities are taken from Bottini, §§ Nullatenus vero, LXXI, 77, Et quoniam, and Ac propterea, CLXXII, 179, 180, Ch. VI, sec. 67, 68 and 69.

Section 9.

[Lamparelli, Pam. 17, CCXLVIII, 245, § Quo vero ad.]

And [secondly] as to her association indeed[1] with Canon Caponsacchi, this likewise does not seem sufficient[2] to establish the stain of infidelity; for since this most hapless woman was absolutely destitute of all earthly[3] aid, and had in vain implored the authority of the Very Reverend Bishop and the Lord Deputy Governor to free her from her deadly peril, and it was not becoming to her special age and sex that she should make her escape alone, or in the company of some common serving maid, [thus] incautiously exposing herself[4] to graver perils, as might have happened if she had been captured when alone on the journey, so that it could not be said of her, "She fell upon Scylla while trying to escape Charybdis;" [since all this is so] it ought not therefore to be wondered at if she took the said Canon as her companion, who had been suggested to her for this purpose both by the Canon Conti, and by Signor Gregorio Guillichini, who were related by marriage to Pompilia's husband. And it is utterly incredible that they would have consented to such an escape, if they had not recognized that it was absolutely necessary in

order that she might escape the danger of death, which they very well knew was hanging over this most hapless woman, and if they had not trusted implicity in the honor and integrity of her companion. And therefore under the pressure of such necessity, the prudent choice of the lesser evil eliminates every possible shadow of the alleged infidelity, as is held by Bald. in leg. filium n. 1 ff. de his qui sunt sui vel alieni Juris [Dig. 1, 6], and in l. 1, n. 35, C. de iis qui acc. non possunt [Cod. 9, 1]; Menoch. de praesumpt. book 6, praesumpt. 54, n. 22 and 23; de arbitr. book 2, cas. 89, n. 23.

[1] quo vero ad; Quoad, here separated, correlative with § Nam quoad assertam epistolam, in the preceding section. [2] apta; fit or likely. [3] mundano auxilio. [4] se exponendo.

Taken from Bottini, § Satius quidem, CLXXIV, 181, Ch. VI, sec. 77, § Nec inhonestatis, LXXII, 78, Ch. VI, sec. 73; the authorities are taken from the latter section.

Section 10.

[Lamparelli, Pam. 17, ccxlix, 246, § Attento praesertim.]

[This is especially true] if there be borne in mind[1] the manner in which the elopement was carried into execution in taking the journey by the direct road to the City, and with the greatest speed, which clearly shows that her single motive[2] was to put her life in a safe place, not to disgrace it with sensual pleasures also; for if this had been her principal reason, she would certainly not have gone to Rome, or [at any rate] not by the direct road, where she could have been captured immediately by her brother-in-law[3] and her parents, but would have betaken herself to more distant regions, or else [she would not have gone] with such great speed, but would have tarried somewhere[4] away

from the public road, and in some place where she could not have been found by her husband, and would have been able to fulfill her desires to satiety.

[1] Attento praesertim modo. [2] unicum motivum. [3] Cognato; evidently Paolo is referred to, who was not, however, Pompilia's cognate, but Guido's. [4] moram traxisset.

Taken from Bottini, § Eaque ulterius, LXXII, 79, Ch. VI, sec. 76.

Section 11.

[Lamparelli, Pam. 17, ccxlix, 246, § Quae utique.]

And this very great improbability[1] certainly shows most clearly the truth of the reason alleged by the woman in her examination, namely, that she had betaken herself quickly to the City, so that she might there place her life and honor in safety in her own parental home; for just as the strongest suspicion of guilt[2] arises from probability,[3] so likewise a presumption[4] of innocence, no less strong, should arise from improbability,[1] as is pointed out by Farinac. cons. 22, n. 34, and de falsis qu. 153, n. 176; Caball. resol. crimin. cas. 149 [199], n. 35; Vermigliol. cons. 31, n. 5 and cons. 256, n. 101; Conciol. resol. crim. 27, n. 2.

[1] inverisimilitudo. [2] indicium culpae. Mr. Hodell translates: "sentence of blame." [3] ex verisimili. [4] praesumptio.

This section is taken from Bottini, § Eaque ulterius, LXXII, 79, Ch. VI, sec. 76.

Section 12.

[Lamparelli, Pam. 17, ccxlix, 246, § Idque bene.]

And this view is well supported by the frank declaration made by the Canon, at the time of his arrest in the tavern at Castelnuovo, to the husband, when the latter was rebuking the Canon[1] concerning this sort of an elopement: "I am a gallant

man,[2] and what I have done, I have done to free your wife from the peril of death;" as is deposed by Jacopo, son of Simon deceased,[3] a witness for the Fisc,[4] page 50 of the Prosecution for Elopement. And I cited a precedent[5] in my argument concerning the elopement, namely, that of Scipio Africanus, who when his soldiers had captured the very beautiful young wife of Aleucius, chief of the Celtiberi, restored her to her husband and said to him, "Your wife has been in my house just the same as she was at your parents' or her own,[6] her honor has been preserved for you, so that she can be given to you as a gift, unharmed and worthy of you and me;" as is related by Titus Livius in his History, book 26, page of my book 493.

[1] ipsimet marito illum objuranti. Mr. Hodell translates: "to the husband himself by the Canon who rebuked him concerning this flight." It was, however, Guido who "rebuked" the Canon. [2] Sono galant' huomo; as we might say "I am a lady's man," a squire of dames. [3] Jacobus quondam Simonis; Mr. Hodell translates: "son of the former Simon." [4] The Fisc, as prosecutor, was then opposed to the Canon and Pompilia. [5] exemplo. [6] apud socros suos parentesque suos.

Section 13.

[Lamparelli, Pam. 17, ccl, 246, § Et licet valde.]

And although it is very difficult for an attractive woman to preserve the dignity of her honor when travelling in the company of a passionate young man,[1] nevertheless it is by no means impossible, as the precedents[2] show that are referred to in my said argument,[3] § Quidquid dicet, to which I add that of Penelope, of whom Ovid sang in book 3 of his Elegiacs,[4] "Although she lacked a guard, Penelope continued chaste among so many suitors."

[1] in societate cupidi juvenis. [2] ut praeseferre videntur exempla. [3] unfortunately the former argument of Lamparelli has not

been preserved. [4] Amores III, 4, 23. Penelope mansit, quamvis custode carebat inter tot juvenes intemerata procos. Lamparelli quoted from memory.

Compare Bottini, § Levis propterea, CLXXVI, 183, Ch. VI, sec. 83.

Section 14.

[Lamparelli, Pam. 17, CCL, 247, § Praesertim cum.]

[And this is true] especially since the journey was not voluntary, just as the company of the Canon was not, but solely to escape the danger of death; and since a necessity of this kind concurred,[1] the presumption becomes entirely inapplicable,[2] which is drawn from Ovid's Art of Love, namely: "From this young and passionate man, can she be believed to have returned a virgin?"[3]

[1] That is, a double necessity existed. Pompilia had to go, and she had to go with the Canon. [2] inapplicabilis. [3] A reference to Spreti's argument, § Omissa ulteriori, CCXXVII, 229, Ch. VIII, sec. 34.

Section 15.

[Lamparelli, Pam. 17, CCL, 247, § Prout nec etiam.]

Just so, even the numerous letters that were found in the closet of the inn at Castelnuovo do not appear to constitute any obstacle to hinder the decree for which we ask, and to spread the stain of infidelity upon Francesca Pompilia, which letters are alleged to have been written by her to the Canon on account of the very fervent[1] love with which she was pursuing him. For indeed the defenses and answers brought forward in the former arguments stand good.[2] The first, namely, is that they were not acknowledged by her,[3] nor was the identity of the handwriting[4] proved, and

some uncertainty[5] may appear about them, since it is not evident to whom they were addressed, nor is it unlikely that they might have been fabricated by her husband,[6] who was present all the time at the arrest and search,[7] and who perhaps was hoping that the charge of adultery which had been brought[8] might more readily appear from them, concerning which charge he was most strongly insisting, so that he might gain in addition the desired dowry and its profits;[9] so that this mere possibility to the contrary is sufficient to avoid the presumption[10] which is alleged to be drawn from the same; Rota coram Ludovis. dec. 352, n. 2; coram Manzaned. dec. 570, n. 2 et seq.; and in Recent. decision 64, n. 25, part 17 recent. And the second answer is that, even if such defenses as these should not stand good, yet[11] no proof[12] can be deduced from these letters of infidelity and of the violation of conjugal vows;[13] for although a presumption of adultery can[14] result from love letters, yet this is entirely destroyed[15] in our case, when it is understood that they were directed to a lawful end, namely, to allure the Canon so that she might provide herself with his assistance in her elopement, and escape the peril of her life, for then, just as the end is permitted, so also should the means[16] be regarded as permitted and lawful, although they are not free from suspicion, for the means should be considered not by themselves alone, but with reference to the end; as is observed by Gratian. discept. forens. cap. 580, n. 8; Gobb. cons. 119, n. 72. Nay more, unless an implied confession of fornication appears from the love letters, the presumption of adultery cannot[14] be deduced from them, as in explaining the authorities who maintain the contrary is advised by Sanchez. de Matrim.

book 10, tit. de Divort. disc. 12, qu. 3, n. 48, and, citing him, Moller. de Cornut. cap. 7, n. 24.

[1] ferventissimum. [2] subsistunt. [3] recognitae. [4] identitas caracteris. [5] incertitudo. [6] This does not appear to be charged elsewhere in the O. Y. B., notwithstanding Mr. Hodell's note 233, where he says the charge is made by the lawyers for the Fisc. Lamparelli, however, was not a lawyer for the Fisc. Browning continually charges Guido with the forgery of the letters, and is followed by all the "critics." [7] perquisitioni. [8] impictum adulterii crimen. [9] ut dotem et lucrum superlucrari potuisset. [10] indicium. [11] adhuc. [12] argumentum. [13] conjugalis fidei. [14] valeat — valet. [15] elisum remaneat. [16] media.

Compare Bottini, § Minusque substitit, LXXIII, 79, Ch. VI, sec. 78; § Ac propterea, CLXXII, 179, Ch. VI, sec. 69. The last part taken with the authorities from Bottini, § Desumenda, CLXXV, 182, Ch. VI, sec. 80.

Section 16.

[Lamparelli, Pam. 17, CCLI, 247, § Validissima.]

This answer is especially very effective when there is borne in mind her consideration not only of her own self-restraint, but also the integrity of the said Canon,[1] in whom she greatly trusted; and she expected that he would behave himself with discretion[2] on the journey, for it appears from the said letters that she rebuked his boldness on another occasion, where we read: "And I marvel that you who have been so chaste have composed and copied matters that are so dishonorable;" and further on: "But I would not have you do in any case as you have done in these books. The first of them is honorable, but the other octaves are quite the contrary. I cannot believe that you who have been of such honor, have become so bold."[3] For a sincere rebuke of this sort, and the contents of the letters in which we read nothing dishonorable, best show and explain the purpose of

Pompilia in writing them; and therefore just as words ought to be understood according to the intention of the speaker, so equally letters should be interpreted[4] according to the intention of the writer, as according to the Text in cap. Intelligentia [Decretal 5, tit. 40, ch. 6], and cap. Praeterea de verbor. signif. [Decretal 5, tit. 40, ch. 8] is held by Oldrad. cons. 9, n. 3; Surd. cons. 431, n. 35; Molin. de Rit. Nupt. book 3, qu. 85, n. 50.

[1] Validissima attenta consideratione tum propriae continentiae, tum integritatis ejusdem Canonici; Mr. Hodell translates: "It should be especially noted that she had very strong confidence in her own continence," etc. [2] modeste. [3] see the letters, CLVI, 160. [4] veniunt interpraetandae.

Taken with the authorities from Bottini, § Urgente praesertim, CLXXVI, 182, Ch. VI, sec. 82. Lamparelli does not hesitate to base an argument on the "forged" letters.

Section 17.

[Lamparelli, Pam. 17, cclii, 248, § Vindicata igitur.]

Since therefore the honor and chastity of Pompilia are vindicated [from any reproach arising] from her elopement and her letters, the other presumptions[1] of her alleged infidelity are of lighter weight, in so far as[2] they are deduced from the visits of the Canon to her home for the purpose of speaking to her; from the treacherous way in which their elopement was arranged and carried into execution, by means of[3] a sleeping draught administered to her husband and the servants; from their interchange of kisses[4] on the journey; and from their sleeping together in the tavern at Castelnuovo; for, besides the general answer that no conclusive[5] proof is brought forward of all these things, as would be necessary[6] in order to

convict Pompilia of adultery,[7] a special answer to each suggests itself.

[1] indicia. [2] quatenus. [3] mediante. [4] mutua deosculatio; affectionate interchange? [5] concludens. [6] prout opus esset. [7] ad constituendam Pompiliam de adulterio ream.

Section 18.

[Lamparelli, Pam. 17, cclii, 248, § Siquidem ingressus.]

Caponsacchi's going into and out of Francesca's home at night time indeed,[1] appears only from the deposition of a single witness, to wit, Maria Margherita Contenti, and since she is subject to two most relevant[2] objections, namely, singleness[3] and prostitution, her word can impose no mark of infamy; as in respect to the characteristic[4] of prostitution is held by Marsil. cons. 102, n. 9; Vermigliol. cons. 408, n. 1; Crot. de Testibus, part 3, n. 46; Mascard. de probat. conclus. 1362, n. 20; and in respect to singleness,[3] Farinac. de Testib. qu. 64, n. 28 and 33; Vermigl. consil. 146, n. 3; D. Canonicus Raynaldus in Sintax, rer. Criminal. tom. primo., cap. Primo, § 10, n. 118. And since such visits were directed to the single end of arranging for the elopement and of stealing away the hapless wife from the danger of death that was so very near her, it should not be presumed to be for an evil end. For whenever[5] a manifest cause clearly appears[6] to which the visits may be referred, and that cause is entirely lawful, they should not be attributed to an unlawful and criminal[7] cause, as from the Text in l. merito ff. pro socio [Dig. 17, 2, 51] Cravetta teaches in terms,[8] cons. 205, n. 7 and 8.

[1] siquidem. [2] relevantissimas; or most important. [3] unicitatis, i.e. uncorroborated. [4] meretriciae qualitatis. [5] quoties. [6] constat de causa expressa. [7] criminosae. [8] in terminis.

The first part with authorities is taken from Bottini, § Levioris, LXXIV, 81, Ch. VI, sec. 85; the latter part with authorities from Bottini, § Ingressus, CLXXVII, 183, Ch. VI, sec. 87.

SECTION 19.

[LAMPARELLI, PAM. 17, CCLII, 248, § MODUS VERO.]

The treacherous manner indeed in which the said Francesca Pompilia made ready[1] for her elopement by preparing a sleeping draught, not only for her husband but for all the servants,[2] aside from the fact that it is not proved, yet assuming it to be proved,[3] affords evidence[4] of her cleverness rather than her infidelity, since the wife would have been extremely foolish, if she had attempted her escape without a precaution of this kind.

[1] devenit. [2] domesticis; family or household. [3] quatenus probaretur. [4] argumentum.

Taken from Bottini, § Praetensus quoque, CLXXVII, 184, Ch. VI, sec. 89.

SECTION 20.

[LAMPARELLI, PAM. 17, CCLII, 249, § EODEMQUE DEFECTU.]

Their alleged interchange of kisses[1] while on the journey, labors under the same defect of proof, since that proof is too light,[2] which is asserted to result from the deposition of a single witness of the lowest class. Especially since what he says is disclosed to be extremely prejudiced,[3] for in fact he testifies that while he was driving the carriage rapidly in the night time, he saw Francesca Pompilia and the Canon kissing one another, without his giving any reason, as that the moon was shining, or that there was some artificial[4] light there to dispel the darkness; and [just as] this circumstance[5] of course is absolutely necessary

in a witness who testifies as to something done at night, so its omission takes away all credit[6] from him, as is pointed out by Bursatt. cons. 34, n. 6; Vermigliol. cons. 74, n. 1; Giurb. cons. criminal. 37, n. 41; Farinac. qu. 66, n. 38; Polidor. Ripa in tractat. de noctur. tempor. cap. 57, n. 7; D. Canonicus Raynald. in book 1, cap. 11, § 8 to 13, n. 8; there being further added the very great improbability[7] that while he was driving the carriage with such rapidity that it resembled flying rather than driving, he should have been able to turn back and observe their mutual kissing. And such improbability is the more increased by what the same witness says, when he testifies that he had driven Francesca Pompilia without knowing that it was she, until afterward on his returning to Arezzo, he met Guido Franceschini her husband on the way following after her, and therefore if he had seen her kissing [the Canon] he would surely have recognized her immediately, since he had often seen her before, and she was well known to him. And therefore it should be positively asserted, either that being influenced by the fatigue of his solitary confinement,[8] he had been forced so to testify, or that, as is more likely, when on account of the very rapid speed of the carriage those who were seated in it jostled together, he believed that the chance approach[9] of their heads and faces was intended for the evil purpose of snatching kisses.[10] Hence the presumption resulting from his deposition was deservedly estimated as of little value, in the Prosecution for Elopement, which otherwise[11] would have been given consideration if it had imported any probability.

[1] mutua deosculatio. [2] parum tuta; not safe, insecure. [3] animosum. [4] artificiale. [5] circumstantia; qualification or explanation.

[6] fidem; credibility. [7] inverisimilitudine. [8] carceris secreti; the witness was of course imprisoned before his examination. [9] casualem approximationem. [10] basia captandi. [11] alias.

First part taken from Bottini, § Eodemque, LXXV, 82, Ch. VI, sec. 91; § Mutua deosculatio, CLXXVIII, 185, Ch. VI, sec. 92. Last part from Bottini, § Augeturque, CLXXIX, 185, Ch. VI, sec. 93.

Section 21.

[Lamparelli, Pam. 17, CCLIII, 249, § Tandem longe.]

Finally, far weaker is the presumption of infidelity drawn from their asserted sleeping together in the said tavern at Castelnuovo, since it was most steadfastly[1] denied both by Pompilia and by the Canon in their examinations, and only a single witness, the houseman[2] of the said tavern, testifies about it, not indeed of his certain knowledge, but by inference[3] from the fact that they had asked him for a bedroom with a single bed, and because the Canon frankly confessed the reason for which he had a single bed made ready, namely, that Francesca Pompilia on account of her ill health and the discomfort of their headlong[4] journey, might rest a little, while he himself watched over her safe-keeping.[5] Such an act should not be attributed to an unlawful cause, as Cravetta points out in such a case, in the consilium cited, 205, n. 9 et seq. where in n. 15 [11] he says the interpretation of an act should always be given the more humane consideration,[6] although the strict construction may seem [the stronger[7]]; and if, as the same author continues in n. 20 and 21, it would not suffice for full proof[8] of adultery, that one be found solus cum sola and nudus cum nuda, and that a young man be found in a closed bedroom with a woman, although he has his coat

off[9] and his shoes unfastened, so much the less can such a presumption arise from his very brief stay in the same bedroom for the purpose of guarding her.

[1] constantissime; or, consistently. [2] cubicularius. [3] praesumptive. [4] praecipitosi iteneris. [5] ipso ad ipsius custodiam vigilante. [6] ad humaniorem partem habenda interpretatio. [7] fortior in Cravetta; here omitted. [8] ad plenam probationem; in its technical sense. [9] dispectoratus.

Taken from Bottini, § Condormitio tandem, CLXXX, 186, Ch. VI, sec. 95.

Section 22.

[Lamparelli, Pam. 17, CCLIV, 250, § Parum refragante.]

It is a very slight objection that Francesca Pompilia in her examination concealed the length of her stay,[1] by asserting that she arrived at the inn at dawn, seeing that, since she was well aware of her husband's credulity, she perhaps made this assertion to avert entirely his suspicion that she had violated her marriage vow,[2] which certainly could have arisen if she had confessed to having passed a longer time at the inn. Hence, if she had not denied the length of her stay[3] under circumstances, however, that are persuasive of the preservation of her honor, her confession would not have brought any prejudice[4] upon her, so likewise her falsehood cannot prejudice her, as is held by Marsil. cons. 15, n. 15; Bertazzol. cons. 59, n. 7; Vermigl. cons. 45, n. 20 and cons. 273, n. 7; Farinac. cons. 192, n. 11 at the middle, vers. Tum etiam, and cons. 222, n. 14, and qu. 52, n. 14 et seq.

[1] hujusmodi moram. [2] fidei. [3] talem moram. [4] praejudicium.

Taken with the authorities from Bottini, § Et quamvis, CLXXXI 187, Ch. VI, sec. 97.

Section 23.

[Lamparelli, Pam. 17, ccliv, 250, § Caeterum quamcumque.]

Besides, every suspicion whatever of her alleged infidelity is entirely eliminated by the assertion of this most unfortunate woman uttered at the moment of her death, after many mortal[1] wounds had been inflicted on her by her husband, that she had never broken her marriage vows,[2] as very clearly appears from the numerous depositions of the men of religion[3] who were attending her at the moment of her death, and who assert that they always heard her earnestly praying for Divine mercy, but not that pardon should be granted to her for such a sin,[4] which declaration surely, being made at the moment of death, deserves all credit, since no one placed in that situation[5] is presumed to be so unmindful of his eternal salvation as to be willing to lie; as is held by Natta cons. 537, n. 18, book 3; Calder. cons. 15, tit. de usur.; Menoch. de praesumption. book 5, praesumpt. 5, n. 3; Farinac. qu. 196, n. 31; Decian. Tract. crim. book 5, tit. de defens. Reor. cap. 37, n. 27; Card. de Luca de Regal. disc. 119, n. 24, and de legat. discurs. 27, n. 10.

[1] laethalia; Mr. Hodell translates, "severe." [2] conjugali fidei. [3] religiosorum virorum; not "religious men" but members of religious orders. [4] Mr. Hodell translates: "praying that she might be given no forgiveness by the Divine Clemency for such a sin." [5] in eo statu constitutus.

Taken from Bottini, § Omnemque praetensae, lxxv, 82, Ch. VI, sec. 99; § Talis autem, clxiv, 173, Ch. VI, sec. 100.

Section 24.

[Lamparelli, Pam. 17, cclv, 250, § Demum nullum.]

Finally, no basis for convicting the memory of the aforesaid Francesca Pompilia of a dishonorable life can be established upon the alleged decree of this most Illustrious Congregation,[1] by which Canon Caponsacchi was condemned to banishment for three years in Civita Vecchia, with a recital[2] of his seduction[3] and his carnal knowledge of the said Francesca Pompilia, for besides that,[4] as the Fisc himself admits,[5] a modification[6] of it was directed (although it was not drawn up[7]) at my instance by my Lords the Judges, with the approval of my most Illustrious Lord [the Governor],[8] and on this account in the warrant for their discharge from prison[9] the said words were suppressed,[10] and these others were written beside them:[11] "For the cause, concerning which in the records," —

[1] the Congregation of the court of the Governor. [2] expressione. [3] deviationis; Mr. Hodell translates: "his running away." [4] ultra quamquod; correlative with the next section, "Besides that the decree was ordered to be changed every difficulty is removed by the fact that Pompilia had no notice." [5] In the Processus Fugae the Fisc was opposed to Lamparelli, the Procurator charitatis. [6] moderatio. [7] extensa. [8] me instante fuit demandata, licet non extensa illius moderatio per Dominos; Mr. Hodell translates: "there was demanded by me, though not in extenso, the modification of that title by the honorable Judges." Extensa, I think, means drawn up or drafted, or perhaps spread out in full on the record. Bottini in § Eoque minus, clxvii, 175, Ch. VII, sec. 15, states that the correction was not made in the Vachetta or docket. Extensa was according to DuCange a notary's word. D'Arnis "minute d'un acte." [9] in mandato de excarcerando; Mr. Hodell translates: "in the order for imprisonment." [10] subticendo dicta verba, fuerunt apposita alia; subticendo apparently from subticeo, by analogy with reticeo, passed over in silence, hence suppressed. Or perhaps a misprint for substituendo or subtrahendo? [11] apposita alia; it might be that the added words were interlined over the objectionable clause, or placed opposite in the margin.

Section 25.

[Lamparelli, Pam. 17, cclv, 251, § Removetur quaecumque.]

[Besides this][1] every difficulty whatever is removed by the mere consideration[2] that the said decree was entered while no [days for] defenses had been assigned to the said Francesca Pompilia, and while she was entirely[3] unheard, and she had not the slightest knowledge[4] of this decree, since no notice had been given to her; and what is more, in the decree assigning the home in place of a prison the cause expressed is only that referring "to the record."[5] Hence the decree could not injure her, having been, as it were, entered against a third party, she herself not having been cited, as, according to the Text in leg. de unoquoque [Dig. 42, 1, 47], and in leg. saepe ff. de re judic. [Dig. 42, 1, 63] the Rota affirmed, Coram Dunozett. Jun. dec. 797, n. 4, and in recent decis. 392, n. 5, part. 18 recentior. And in the case where a decree, entered against an adulterer, does not injuriously affect the adulteress who has not been cited, there is the Text in leg. denunciasse, § ultimo ff. ad leg. Jul. de Adulter. vers. Si condemnatus [Dig. 48, 5, 18, 6], where it is said, "If he has been condemned, the woman is not condemned through him, but may conduct her own case," etc.; and so Caroc. gives his opinion, de exception. except. 97, n. 1, et seq.

[1] correlative with the preceding section. [2] ponderatione. [3] poenitus. [4] notitiam, perhaps legal notice. [5] relativa ad acta.

Taken from Bottini, § Exindeque corruit, clxviii, 175, Ch. VII, sec. 16, and § Quod autem, clxviii, 176, Ch. VII, sec. 17.

Section 26.

[Lamparelli, Pam. 17, cclv, 251, § Potissimum cum modo.]

And this is most important since our argument does not concern the acquittal of the husband from the charge of uxoricide, and the inference of a just cause as excusing him from the penalty of the Lex Cornelia, arising from his ready belief in the infidelity of his wife as a result of the said decree, — in which case the changing[1] of the aforesaid decree could perhaps serve him for something to talk about,[2] but [the argument concerns] the condemnation[3] of the memory of a woman who is dead, and the infliction of infamy upon her and her family,[4] in which case just as this "contumacy decree"[5] could not injure her in life, so likewise it cannot occasion her any prejudice[6] after her death.

[1] immutatio. [2] poterat forsan inservire de vento; "serve him for wind? almost in slang phrase, hot air. Mr. Hodell translates: "serve for an escape." [3] Mr. Hodell translates: "damning of the memory." [4] de irrogando eidem ac familiae infamiam; Mr. Hodell translates: "rescuing her and her family from infamy." [5] contumaciale decretum; Mr. Hodell translates: "harsh decree." It means a decree entered against one who was contumax, that is, who refused to appear in obedience to the mandate of the court. Lamparelli's point is that as Pompilia had no notice of the decree against Caponsacchi and had not been cited, she was a third party, and the decree was, as to her, like a decree in contumacy, which apparently could be set aside or opened if the defendant appeared. The law was not very clear as to the effect of such a decree; it would seem, however, that the Judge was at least bound to examine the proofs with great care. See Bassanus, Theorico-Praxis, Book 6, ch. 1 to 4, passim; Dynus, dec. 29, n. 36; Guazzinus, Defens. 2, ch. 8, n. 16. [6] praejudicium.

The MS. note in the O. Y. B. is "And according to the letter of Carolo Antonio Ugolinucci, May 17, 1698, I understand that the Congregation of the Criminal Court, after two votes, decided on absolution."

[Instrumentum Sententiae Definitivae. Pam. 18, cclix, 252.]

The translation of the Final decree which follows is difficult on account of the technical nature of the formulae, and the abbreviations which in many places obscure the meaning.

RECORD OF DEFINITIVE DECREE[1]

pronounced for the restoration of the good name and reputation of the late Francesca Pompilia, formerly the wife of the late Guido Franceschini, of Arezzo; also for the judgment of relief,[2] in favor of Domenico Tighetti, as heir beneficiary of the said Francesca Pompilia, from all troubles, annoyances, vexations and disturbances, brought and threatened to be brought by the Venerable Monastery of Saint Mary Magdalen of the Convertites in the Corso; together with the citations executed according to law for the observation of the four terms for making proof to the Court as to an appeal,[3] and its lawful prosecution, in order that the said decree should pass over, as it has passed over, to final judgment,[4] by reason of no appeal having been interposed.

[1] not exactly final judgment. A definitive judgment is one that is final so far as the Court is concerned which enters it, and is distinguished from an interlocutory judgment. See Bassanus, cap. ult. de Sententiis. [2] absolutoriae. [3] pro servatione quatuor terminorum ad docendum de appellatione. Terminus, as "terms of court." Ad docendum; Mr. Hodell translates: "to instruct themselves," but docere means "ostendere seu apud judicem probare," i.e., to make proof to the Court. Time was allowed after judgment for an appeal, which might be taken before the Judge, see Clarke's Praxis, Tit. ccxxxiv, but the appeal might be, and I think was generally, taken before a Notary; see forms in Ars Notariatus sive Tabelliorum, Cologne, 1570, p. 269. In this case it was necessary to cite the unsuccessful party to show the court that he had taken the appeal. This practice was carried over into the ecclesiastical procedure in England; see forms in Francis Clarke's Praxis in Curiis Ecclesiasticis, who uses this phrase "ad docendum" in Tit. cclxix, and see Tit. cclxxxviii. [4] in judicatum. No appeal having been taken, the

In the name of God, Amen.

In the year of Our Lord the sixteen hundred and ninety-eighth, in the Sixth Indiction,[5] to wit, on the ninth day of the month of September, in the Eighth year of the Pontificate of the Most Holy Father in Christ and of our Divine Lord[6] Innocent XII, Pope by Divine Providence.

This is a copy or transcript[7] of the underwritten citations and Decree made according to my record,[8] and pronounced respectively,[9] of the following tenor, to wit:

Before[10] the Most Illustrious and Reverend Lord Governor in Criminal Cases: Let there be cited the undernamed adverse principal parties in this case, and all other parties for every legal purpose,[11] to appear before the Criminal Congregation[12] tomorrow, which will be the 19th day of the present month, at the customary hour of convening the Congregation, and also to see that

definitive decree passes over into final judgment. [5] indictio was a cycle of fifteen years. This inconvenient and unscientific method of chronology originated in the 4th century, and was much used by the Popes and in Italian law. Beginning on September 1, the first year of each cycle was called Indiction 1 and so on. In order to find the indiction of any year A.D. add three and divide by 15, the remainder will be the indiction. Thus for 1698, add three, making 1701, which divided by 15 leaves 6. See Hampson Medii Aevi Calendarium, Gloss Indiction. Note to Garrod & Mowat's Einhard's Life of Charlemagne, p. 74; Hodgkins, Letters of Cassiodorus, ch. 6. [6] D[omini] N[ostri] D[ivini]. [7] transumptum, not a misprint for transcriptum, but having the same meaning. D'Arnis, transsumere = transcribere, copier. [8] Copia citationum per acta mei factarum, i.e., the record of Barloccius, Notary of Charity, who gave the certificate. [9] the service of the citations was made (factarum) according to the records of the Notary; while the sententia was "lata" or pronounced by the Court, "respective." [10] [Coram] Gubernatore. So throughout the O. Y. B. in the endorsements of the several pamphlets. [11] et alias [pro] omni [juris effectu], &c., perhaps for alias omnes interesse habentes. [12] the congregation

all and singular the essential terms of court be repeated that have perchance been erroneously, illegally and improperly held, and observed according to the force of all the powers of the court,[13] to conclude that the complainant be absolved from adverse judgment,[14] so far as, &c. [so far as any there be], and to see that it be so concluded in the cause. And that the definitive decree be heard in form at the day aforesaid[15] at the instance of Domenico Tighetti, heir beneficiary of the late Francesca Pompilia, wife of the late Guido Franceschini, principal party in the cause, or &c.[16]

NOTARY OF CHARITY.

The Most Illustrious Francesco Gambi, Procurator General of the Fisc, and the Reverend Apostolic Chamber.[17]

Giovanni Maria Serbucci, Procurator and appointed Dominus Litis[18] of the late Guido Franceschini.

Francesco Paracciani, Procurator of the Venerable Monastery of Saint Mary Magdalen of the Convertites on the Corso, for every legal purpose.[19]

On the other side appeared the Procurator General of the Fisc, and said that no judgment could be given except in favor of the Fisc, and so far as &c.,[20] he demands that time for consideration[21] be given him for that purpose, &c., and that in the meantime [the Court] should not proceed to any determination of the case, unless the case be

of the Criminal Court of the Governor. [13] in vim quarumcumque facultatum. [14] absolvi Instantem a censuris quatenus, &c. [15] ad p[raedictam] d[iem]. [16] sive, &c.; "or to show cause." [17] R. A. C. [18] Dominus litis effectus. After the issue was joined the procurator became Dominus litis, master of the lawsuit, with full authority over it. Serbucci is not mentioned elsewhere in the O. Y. B. He may have represented Guido in the Processus Fugae. [19] pro omni [juris effectu]. So in other instances below. [20] quatenus; so far as, or assuming that, it was necessary for him to contend. [21] instat sibi dari dubium [tempus].

decided[22] in the full Congregation and upon a vote of the Lord Judges thereon, and upon examination of the adverse party in prison,[23] and unless all be cited who have otherwise any interest, &c. On this day August 18, 1698.

FRANCESCO GAMBI, Fiscal General.

I made personal service on the Fisc on the said day, and sent a copy to the others at their homes, August 18, 1698.

BALATRESIUS.[24]
ALOYSIUS PICHIUS, Substitute Fiscal General.[25]

On the 19th day of August, 1698, return of the citation[26] having been made, Antonio Lamparelli, Procurator, appeared and petitioned as above;[27] Whereupon the very Illustrious and Most Excellent Lord Marco Antonio Venturini J. U. D.,[28] sitting as Locumtenens[29] of the Most Illustrious and Most Reverend Governor of our gracious City in Criminal Cases, &c., delivered judgment as in this schedule which he took in his hands, saw, read and subscribed, and gave to me as Notary for publication, and sealed of the tenor, &c., and so, &c., in the presence of Antonio Bernardino Piceno and Antonio Toparino of Capraolo as witnesses, &c.;[30]

In favor of Domenico Tighetti in the name of, &c.,[31] and against the Fisc and his associates in the suit.

[22] nisi relata causa; or, referred. [23] constituto adversario in carceribus; perhaps the usual formula. See forms in Bassanus, pp. 318, 321, 353, &c. [24] probably an officer of the Notary of Charity. [25] he has signed as admitting the service. [26] relatione facta. [27] that is, for the entry of the decree. [28] Juris utriusque Doctor. [29] Deputy or Lieutenant Governor. [30] It seems strange to us that a decree of the Court should be required to be executed with such formality. These witnesses were probably clerks of the Notary who kept the records. [31] in

In the name of Christ, which we have invoked, we, sitting as Deputy for this tribunal, and having God alone before our eyes, by this our Definitive Decree, which by the advice of those experienced in the law we now make public in these writings in the cause and causes which have been and are now litigated before us in the first or other more accurate trial[32] between Domenico Tighetti, as heir beneficiary of the late Francesca Pompilia, wife of the late Guido Franceschini of Arezzo, of the one part, and the Fisc and Giovanni Maria Serbucci as Procurator and appointed Dominus Litis of the said late Guido Franceschini, and also the Venerable Monastery of Saint Mary Magdalen of the Convertites on the Corso, for all their right and interest, parties of the other part, of and concerning the alleged adultery committed by the said Francesca Pompilia with the Canon Giuseppe Maria Caponsacchi, and the other matters in the record of the cause and like causes more fully produced, &c., by force of the decree for the reference of the case, made by the most Illustrious Auditor S. S.[33] according to the records of Paschasius,[34] concerning which in the record, &c.;[35] the cause having been decided in the Congregation and according to the vote thereof: We do say, pronounce, declare and definitely adjudge, from the matters newly produced THAT THE ALLEGED ADULTERY DOES NOT APPEAR and therefore the memory of the said Francesca Pompilia shall be and is ENTIRELY restored, to its original good name and

the name of Pompilia? [32] in prima seu alia veriori versae fuerunt et vertuntur instantia; i.e., in the first instance, or in this second more accurate instance or trial. [33] S. S.; Sanctae Sedis. [34] undoubtedly the notary of the Auditor or Judge, who remitted the case for further hearing to the Deputy Governor. [35] i.e., as appears in the record.

reputation, and that the said Domenico Tighetti in the capacity above mentioned, in accordance with what has been in this matter thus far produced, shall be and is acquitted and freed from all and singular the troubles, annoyances, vexations and disturbances brought, or threatened to be brought, by reason of them,[36] just as in the succession of these [suits][37] we do restore [her memory] and do acquit and free [him] respectively as above, and we order and command that her memory shall be considered as restored, and he acquitted and freed respectively, and we order that the prosecution or prosecutions whatsoever framed thereupon shall be effaced, as we do efface and quash them, by enjoining perpetual silence upon the Fisc and his associates in the suit, and so we do say, pronounce, declare, and definitively decree, not only for this but for every legal purpose.[38]

I Marco Antonio Venturini, Deputy Governor, have so pronounced.

Given on this 19th day of August 1698, in the presence of Antonio Bernardino Piceno and Antonio Toparino of Capraola, witnesses, &c.

Before the Most Illustrious Governor of the City in Criminal Cases, or before the Most Excellent Lord Venturini.

Let the undernamed be cited for making proof to the court concerning an appeal, and its prosecution according to law the first time for the first citation[39] on the day aforesaid[40] at the instance of

[36] i.e., Pompilia's good name and reputation; harum occasione. [37] harum serie. [38] non solum, &c., sed et omni [juris effectu]. [39] primo pro prima [citatione]. So below on the subsequent citations. See the forms in Bassanus, Book 6, ch. 1, n. 118. Martinus in Praxis Criminalis has the form "infra terminum quinque dierum, quorum tres primi, pro primo, reliqui vero duo, pro secundo, ultimo et peremptorio termino," &c. [40] ad p(raedictam) d(iem).

Domenico Tighetti, heir beneficiary of the late Francesca Pompilia, formerly the wife of the late Guido Franceschini, principal party, or &c.[41]

[PROCURATOR OF] CHARITY.

Giovanni Maria Serbucci, as Procurator and appointed Dominus Litis of the said the late Guido Franceschini, principal party on the other side.

Francesco Paracciani, on the other side, Procurator of the Venerable Monastery and nuns of Saint Mary Magdalen of the Convertites on the Corso for every legal purpose, &c.[42]

I made service of the said citation[43] at their homes, August 31, 1698. MOLINELLUS.

On the first day of September 1698, return having been made, the Reverend Lord[44] Alexander Cassar, Procurator Substitute of Charity, appeared, petitioned, and obtained [decree] as above.

Before the Most Illustrious Governor of the City in Criminal Cases or the Most Excellent Lord Venturini.

Let the undernamed be cited for making proof to the court concerning an appeal, and its prosecution according to law, the second time for the second citation, on the day aforesaid at the instance of Domenico Tighetti, heir beneficiary of the late Francesca Pompilia, formerly the wife of the late Guido Franceschini as principal party or &c.

[PROCURATOR OF] CHARITY.

Giovanni Maria Serbucci as Procurator and appointed Dominus Litis of the said the late Guido Franceschini, principal party on the other side.

Francesco Paracciani, on the other side, Procurator of the Venerable Monastery and the nuns of Saint Mary Magdalen of the Convertites on the Corso, for every legal purpose, &c.

[41] sive, &c. [42] no citation issues against the Fisc, who is apparently concluded by the definitive decree. [43] feci domi d(ictae) c(itationis). [44] R. D.

I made [service] on the first day of September 1698. MOLINELLUS.

Before the most Illustrious Governor of the City in Criminal Cases, or the most Excellent Lord Venturini.

On the third day of September 1698, return having been made, the Reverend Lord Alexander Cassar, Procurator Substitute of Charity, appeared, petitioned, and obtained [decree] as above.

Let the undernamed be cited for making proof to the court concerning an appeal, and its prosecution according to law, the third time for the third citation on the day aforesaid, at the instance of Domenico Tighetti, heir beneficiary of the late Francesca Pompilia, formerly the wife of the late Guido Franceschini, principal party or &c.

[PROCURATOR OF] CHARITY.

Giovanni Maria Serbucci as Procurator and appointed Dominus Litis of the said the late Guido Franceschini, principal party on the other side.

Francesco Paracciani, on the other side, Procurator of the Venerable Monastery and the nuns of Saint Mary Magdalen of the Convertites on the Corso, for every legal purpose.

I made [service] on the third day of September, 1698. MOLINELLUS.

On the fourth day of September 1698, return having been made, the Reverend Lord Alexander Cassar, Procurator Substitute of Charity, appeared, petitioned and obtained [decree] as above.

Before the Governor in Criminal Cases or the Most Excellent Lord Venturini.

Let the undernamed be cited for making proof to the Court concerning an appeal, and its prosecution according to law, the fourth time for the fourth

and last postponement; and it is decreed, &c., on the day aforesaid at the instance of Domenico Tighetti, heir beneficiary of the late Francesca Pompilia, formerly the wife of the late Guido Franceschini, principal party, or &c.

[PROCURATOR OF] CHARITY.

Giovanni Maria Serbucci as Procurator and appointed Dominus Litis of the late Guido Franceschini, principal party on the other side.

Francesco Paracciani as Procurator of the Venerable Monastery and the nuns of Saint Mary Magdalen of the Convertites on the Corso, for every legal purpose.

I made [service] on the fourth day of September 1698. BALATRESI.

On the fifth day of September 1798, return having been made, the Reverend Lord Alexander Cassar, Procurator Substitute of Charity, appeared, petitioned and obtained [decree] as above.

Which copy to wit, I, Domenico Barlocci, Notary of Charity of the Court of Criminal Cases of this Most Illustrious Tribunal and of the Most Reverend Lord Governor of this gracious City, — although it was extracted by another person, who is worthy of my trust, from the original records, with which I have compared it, and found it to agree, saving always, &c.[45] — have in testimony of the aforesaid, subscribed and published as thereunto required.

In place X of the seal
of the aforesaid Notary

[45] salva semper, &c.; saving always, typographical errors?

CHAPTER XIII

COMMENTS ON THE CASE

A perusal of the foregoing chapters of this book, including the translation of the arguments, should enable the reader to form his own conclusions upon the questions that were debated; but it may not be inappropriate for the writer to offer for consideration some comments of his own. It must be borne in mind throughout that the real question was, namely, whether Guido and his confederates should be punished with death. It was admitted by their counsel that they were guilty of a crime that was severely punishable, but it was urged in their behalf that in the circumstances of the case a sentence milder than the death penalty should be pronounced. The defense that the homicides were committed ex causa honoris runs throughout all the arguments, and this of course turned on the innocence or guilt of Pompilia, which may naturally be regarded as the central fact of the case. The subsidiary questions, however, were very numerous and most of them deserve consideration, so that the more important of them, therefore, will also be briefly discussed.

The preliminary question of the legality of the torture of the Vigil need not detain us long, for the discretion of the Court in its infliction was very broad and can scarcely be said to be subject to review. Under the Constitution of Paul V, indeed, the Vigil was restricted to cases where the crime was "most atrocious," and where there were

the strongest "indicia" of guilt, and so far as the first of these requisites was concerned, it would appear from the examination of the defendants that Guido's intent and instructions to his associates were only to disfigure or mutilate Pompilia. Counsel for the defense therefore argued that this crime was not "most atrocious," in that it was not punishable with a penalty more severe than death, and further that the crime, whatever it might be, was mitigated by the plea of causa honoris, especially in Guido's case, as he was a nobleman. These propositions were successfully combated by the Fisc, who laid stress on the aggravating circumstances of the crime, and the discretionary powers of the Court, so that the interim decree for torture was quite justified by the authorities and the practice. The subsequent fuller confessions of the defendants showed definitely that the homicides were intentional, but that Guido and his confederates were impelled by the motive of redeeming Guido's honor; and in the second stage of the argument the defendants' counsel argued first, that either the confessions, being extorted by an illegal decree, were void (repeating here their former arguments) or, secondly, if they should be received, they must be taken as a whole, and that the confessions showed that Guido committed the crime for a just reason, ex causa honoris. The latter proposition was strenuously opposed by the Fisc, who relied upon the great authority of Bartolus that such a qualification annexed to a confession should be disregarded, or at any rate, in a case involving many aggravating circumstances should not have the effect of mitigating the penalty. It would seem reasonably clear, however, that the current of

authority, especially the more recent decisions, sustained the theory of the defense, so that we may assume in the further discussion of the case that the homicides were intentional, and that they were prompted by the causa honoris.

In examining the question of Pompilia's guilt, it will be premised that demonstrative evidence of the commission of such a crime as she was alleged to have committed is seldom obtainable, nor was it produced in this case. The defense urged that it was proved, first by the presumptive testimony, and secondly, that it was res judicata, having been determined by the previous decree of the court in the prosecution of Pompilia for elopement, by which Caponsacchi had been sentenced to relegation as particeps criminis.

So far as the testimony is concerned, the Fisc laid so much stress on the examinations of Pompilia and Caponsacchi in the elopement case that these should be given special consideration. It will be observed that, in accordance with the legal procedure of the times, the defendants were separately examined, so that it was not possible for either to adjust the details of his or her story in accordance with that told by the other. According to our practice, while the segregation of witnesses is permitted, it is only rarely employed, and inconsistencies or contradictions are principally developed through cross-examination, but in this case Pompilia and Caponsacchi told their stories separately.

These examinations are so inconsistent and contradictory, that it is difficult to avoid the conclusion that both are unworthy of credence, except so far as they are admissions against the several deponents, or corroborated by independent testimony.

The testimony is carefully analyzed by A. K. Cook in his Appendix V, and I shall do no more here than to point out some of the most material contradictions.

Pompilia relates three distinct conversations which she held with Caponsacchi before their elopement, and further testified that on the last Sunday of April 1697, he signalled to her with his handkerchief; whereas Caponsacchi testified that he had never spoken to her except on that Sunday. Pompilia said in her deposition that Caponsacchi did not send her any letters, whereas Caponsacchi testified that he had sent her at least three. Pompilia testified most positively that she sent no letters to Caponsacchi, whereas he testified that he received at least four letters from her, using the expression "from time to time."

Pompilia's statement in her examination May 12, 1697, that she did not know how to write, is shown to be false by her own letter to her parents, dated May 3, 1697, ten days before. Pompilia expressly denied having sent to Caponsacchi any letter by the maid Maria; Caponsacchi positively asserted that she had done so. Pompilia twice in her depositions said that Caponsacchi and she arrived at Castelnuovo "at the blush of dawn," whereas Caponsacchi testified that they arrived on Tuesday evening, the last day of April, as in fact they did. That Pompilia's statement was false was admitted by Bottini in his argument, § Et quamvis, CLXXXI, Ch. VI, sec. 97, and also by Lamparelli in § Parum refragante, CCLIV, Ch. XII, sec. 22. Pompilia moreover asserted that she did not lie down in the tavern at Castelnuovo, which statement Caponsacchi clearly contradicts.

It cannot be said that the matters as to which they thus disagreed, were non-essential details. They were the pivotal points of the case, particularly the extent of their correspondence, and the length of their stay at Castelnuovo. As to the discrepancies in their examination concerning the details of their elopement, see A. K. Cook, p. 126.

It would seem incontrovertible that the elopement of Pompilia and Caponsacchi was in pursuance of a clandestine correspondence. The young wife of a loveless marriage, living unhappily with her middle-aged husband, eloped with a young man whose relations with her had strongly excited her husband's jealousy, and after two days' journey they spent the night alone together at a roadside inn. The suspicious circumstances, and they were many, are grouped together in the opening sections of the argument for Guido, and the authorities cited show that most, if not all, of them afford strong presumptions of Pompilia's guilt. Of these presumptions one deserves especial notice, that is, the presumption arising from the mutual love letters, asserted by Pompilia's modern advocates to have been forged by Guido. The objection made by the Fisc to these letters, that the handwriting had not been proved, was purely technical, as they had been offered by him in the Prosecution for Elopement, and the excuse made for them was merely the specious one that Pompilia feigned her love to the Canon in order to attract him to her assistance. Bottini's unfortunate reference to Judith and Holofernes in this connection, § Minusuque subsistit, LXXIII, Ch. VI, sec. 78, met with a stinging reply from Archangeli in § Patet igitur, CVIII, Ch. VI, sec. 43. The only hint in the Old Yellow Book of the forgery of these

letters is contained, not in the arguments of the Fisc, but in that of Lamparelli, § Prout nec, CCL, Ch. XII, sec. 15, and is unsupported by either testimony or reasonable inference. The objection that Pompilia did not know how to write was urged only in connection with her letter to the Abate Paolo, which she claimed had been traced by Guido in pencil and inked over by her at his command, a story the probability of which is more than doubtful on its face, for this would be impossible without the process being clearly apparent. Archangeli in § Nam Praeterquamquod, CIV, Ch. VI, sec. 41, demanded an inspection for that reason, but apparently in vain. All this took place in June 1694, while the letters to the Canon were dated nearly three years later, and Pompilia in her letter to her parents, dated at Castelnuovo on May 3, 1697, after her arrest, states expressly that she finished learning how to write in Arezzo, and, as has been pointed out, she thus contradicted her statement in her examination that she did not then know how to write. The authenticity of this letter cannot be doubted, as it was offered by the Fisc, and moreover Bottini refers to it in § Ac propterea, CLXXII, Ch. VI, sec. 69, and indeed Bottini throughout his argument makes repeated mention of her letters to the Canon whenever they might seem to support the theory of her innocence, as for example in § Satius quidem, CLXXIV, Ch. VI, sec. 77. Browning, who is responsible for the theory that the love letters were forged, says in The Ring and the Book, VI, 928:

> "So he not only forged the words for her
> But words for me, made letters he called mine:
> What I sent, he retained, gave these in place,
> All by the mistress-messenger!"

All this is merely surmise. Nothing in the Old Yellow Book supports it. Bottini does indeed say in § Ac propterea, CLXXII, Ch. VI, sec. 69, that the letters might have been written by another hand, but this was said en passant in connection with the letter written to the Abate Paolo. As Browning makes Bottini say in The Ring and the Book, IX, 836.

> "Pompilia rose above the Roman, cried,
> 'To read or write I never learned at all!'
> O splendidly mendacious!"

The claim is made by Pompilia's latter-day advocates, including Mr. A. K. Cook, that she was unable by lack of education to compose these love letters, which Sir Frederick Treves says are "in an affected and stilted style, and with no small pretense at literary skill," containing as they do allusions to Tasso, Theseus, Venus, the Graces, and the Milky Way. Surely Bottini would not have overlooked this point, if it possessed any force, but there is little reason why a girl of seventeen should not have acquired this elementary acquaintance with familiar Italian and classical allusions, and there is even less reason to doubt that she might have used as models some forms of love letters that had come in her way — perhaps from some "letter-writer's handbook" — or procured assistance in writing them, if too illiterate herself to master their composition.

Bottini indeed admits, § Satius quidem, CLXXIV, Ch. VI, sec. 77, that Pompilia should have sought the assistance of the Bishop in order to enter a monastery, or the home of some respectable woman, or at least have fled in the company of some member of her own family. His justification

of her course was that her flight was caused by her domestic troubles and Guido's ill treatment of her. The former, however, took place while her parents were living at Arezzo, where the ill-assorted household indulged in constant bickering, but even the bitter affidavit of the discharged servant, Angelica, does not disclose any ill treatment of Pompilia by her husband, beyond a brief and vague reference at its conclusion to insults offered to her. All of this moreover took place in 1694, and there is nothing to show any subsequent ill treatment of Pompilia, except that in her own deposition she says that Guido threatened to kill her on account of his jealousy of Caponsacchi. That these threats justified Pompilia's choice of Caponsacchi as a companion, in thus making her escape from her husband's home in company with the very man whom he suspected, seems indeed a strange argument, only equalled by the assertion that Pompilia's letters to the Canon in which she reproved him for sending her some immodest verses, showed her confidence that he would behave himself with propriety on the journey, § Urgente, CLXXVI, Ch. VI, sec. 82.

The Fisc, however, relied in addition upon the declarations made by Pompilia just before her death in which she asserted her innocence. These declarations were proved by sundry affidavits of the Augustinian friars, the apothecary, and others who attended her, which appeared to have been obtained for use in rebutting the claim asserted or threatened by the Convent of the Convertites. The Fisc rested its argument upon the principle expressed in the maxim that a dying person, having his eternal salvation in mind, is presumed to tell the truth. Counsel for the defense retorted that

these were extrajudicial affidavits made by interested parties, and inadmissible for other legal reasons, but particularly that they were incompetent, according to the maxim or brocard of Baldus de Ubaldis that all persons are not presumed to be Saint John the Baptist, and that no one is bound to disclose his own disgrace. The authorities on the subject in such a case as Pompilia's are not clear, but it would seem from an examination of them, that even if her declarations were entitled to some consideration, they did not by any means give rise to a very strong presumption, much less to positive proof.

A dying person may be impelled to tell the truth in some circumstances and to conceal it in others. Temperaments also vary. The solemnity of the hour may powerfully affect some and leave others unconcerned. Motives are mixed, and the strongest governs. It is one thing to accuse another person of crime, and a very different and much more difficult and unpleasant thing to confess one's own sins. Pompilia may well have declared her innocence to protect her estate from the claim of the Convertites or, what is extremely likely, to save the good name of her child, her lover, and herself. Perhaps the reader may remember Rupert Hughes's "What Will People Say?" The climax of that powerful novel is the converse of our case. Said Persis in the last scene with her injured husband before he kills her — "I know, I know, but we can keep other people from knowing. We don't have to tell all the world, do we?" And then in dying she tells the old butler that she killed herself — "Remember, I did it myself."

We pass to the second branch of the argument for Guido, that Pompilia's guilt was determined by

the decree of the Court in the Prosecution for Elopement. By this Caponsacchi was sentenced to relegation for three years "for complicity in the elopement, and for the seduction of Francesca Pompilia, and for carnal knowledge of the same." This decree was made in the very same court of the Governor, in the Prosecution for Elopement to be sure, but all the proceedings therein were considered as evidence in the trial of Guido, so it was greatly relied upon as res judicata by his counsel. The answer of the Fisc was twofold, first, that the language of the decree had been modified; second, that the punishment of relegation for three years to which the Canon had been sentenced was disproportionate to the offense of cognitio carnalis, and therefore he could not have been guilty of it. The alleged modification consisted in the substitution of the words "for the cause concerning which in the record, &c.," but on the other hand it appeared that although Lamparelli, who in the Prosecution for Elopement represented Pompilia and Caponsacchi, asked that this correction be made, and as claimed by Bottini the modification was perhaps directed by the Court, yet it was not in fact so made. That the sentence was disproportionate to the offense was practically conceded; the answer, however, that this made no difference, so far as its effect on Guido was concerned, was doubtless true. Spreti, however, made the tactical mistake of arguing that the lightness of the punishment was due to the fact that Caponsacchi was a foreigner, and had committed the crime outside of the Ecclesiastical State. This enabled Bottini to make a very effective reply which diverted the argument from the real issue. The facts seem to be that the Court in the Prosecution

for Elopement believed Pompilia and the Canon to have been guilty, and sentenced him accordingly, as stated in the decree, and its modification was directed in order, by the omission of the title of the crime, to save the reputation of the parties, especially, as Spreti put it in § Nec verum, CXXVI, Ch. VII, sec. 4, by reason of the respectability of the Canon, to which reason also the leniency of his punishment may be attributed.

Upon all the facts as thus developed, it seems quite clearly established that Pompilia was guilty of adultery with Caponsacchi, and we may proceed to the next branch of the argument, whether Guido in killing his wife after an interval, and not when detected in the act, was to be punished with death or more mildly. Guido's counsel opened with a general discussion of the law in ancient and modern times by which extraordinary lenity was shown to husbands whose honor was thus offended, entitling Guido to suffer a punishment less severe than death, and there was quoted the celebrated rescript of Theodoric by Cassiodorus to show that even the beasts are animated by the same spirit of revenge. The Fisc answered with the argument that under the fundamental texts of the Corpus Juris and the weight of the subsequent authorities, the wife must be detected in the act and killed immediately, and that mere suspicion, however strong, was not enough, nor was subsequent proof equivalent to actual detection. The Fisc further argued that in any event Guido lost his right to vengeance when at Castelnuovo he had recourse to the law. The reply made by Guido's counsel was elaborate. After an exhaustive examination of the authorities, especially that of Farinacius, they argued that detection in the act was not essential,

that suspicion was sufficient, especially when confirmed by subsequent proof, and that injury to honor being always fresh in the mind of the injured husband, his vengeance was always immediate. A further strong argument was drawn from the abrogation of the right of divorce, which would drive the husband into the dilemma of taking vengeance by his own act, or of exposing himself to ridicule and scorn by availing himself of legal redress. Guido's failure to avenge himself at Castelnuovo was explained by his physical inability to resist Caponsacchi, a much younger and stronger man, and his recourse to the law being thus temporary, he was freshly exasperated by Pompilia's return to the home of the Comparini. Upon the whole, it would appear from the authorities that if Guido had killed Pompilia, and Caponsacchi as well, at Castelnuovo, he would have been only mildly punished, or even acquitted, and we should never have had The Ring and the Book, or heard of the case. Indeed Bottini practically admitted this in § Solumque de poena, LXXVIII, Ch. VIII, sec. 87, and in § Fateor quidem, CXCVI, Ch. VIII, sec. 88. Whether Guido would have been condemned to death for killing Pompilia when and where he did, had he done so without any aggravating circumstances, is more doubtful. According to the strict letter of the Justinean law and many of the more conservative authorities, he would have incurred capital punishment, but the current of more modern decisions would seem to favor the mitigation of the penalty by the court, or at least to ensure executive clemency, so that it is not improbable that he would have escaped with a severe punishment, but one short of death.

But the homicide was attended with several aggravating circumstances and the effect of these will now be considered.

The first of these was the offense of conventicle, or the assembling of armed men, contrary to the provisions of the Bull of Sixtus V, which constituted this as the crime of rebellion. This presented a really doubtful or at least a fairly arguable question, the full consideration of which would require an elaborate analysis of the authorities. It was argued on both sides with much ability and learning, and Guido's defense, which was derived principally from the decision 61 of the Sacred Rota, as reported by Farinacius, was certainly very strong. On the other hand, Gambi's and Bottini's argument, which was based on Spada's opinion in his consilium 25, was more logical, and very forcible, especially in consideration of the Banns on the same subject, which fixed the number of armed men necessary to constitute a conventicle, at only four. Upon the whole, the Fisc had the stronger case, and it would seem that there was very substantial ground for holding Guido subject to the capital penalty.

The second aggravating circumstance of Guido's crime was his violation of the Bull of Alexander VIII and the Banns, which prohibited the carrying of firearms shorter than two palms in length, or of knives shorter than three palms, regulations intended to prevent the use of concealed deadly weapons, or rather of weapons easily capable of concealment. That the law had been violated would seem reasonably clear. The defense answered that this offense was merged with the principal crime, and this argument was supported by substantial authority, although the stringent

language of the Bull is difficult to overcome, and the Fisc was supported by the weight of the decisions. But whatever might be the proper interpretation of the Bull, it is not easy to resist the application of the Banns, which expressly declared against the merger of the crimes. On this ground also Guido was therefore justly condemned to death.

The third cause alleged as an aggravating circumstance, namely, that the homicides were committed ex causa litis, does not seem so substantial. To be sure suits at law were pending between Guido and the Comparini, and also Pompilia's suit for divorce against Guido, but the position of the defense would appear to be sound that subsequent provocation had intervened. The Bull of Alexander VI, did not in spirit at least apply to such a case, and the decisions interpreting the Bull would exclude it. Spreti and Archangeli seem to have decidedly the stronger position in this branch of the argument.

A further circumstance urged by the Fisc as an aggravation of the crime was the fact that Pompilia was slain in the home of the Comparini assigned to her as a prison, she having given a bond with sureties not to depart from it, so that Guido was guilty of an offense against the sovereignty of the State. Indeed the Fisc maintained further that a homicide committed in a home was of itself aggravated, as constituting a violation of the dwelling, but this was merely a makeweight in the argument, to which Archangeli did not deem it necessary to reply, except perhaps in his playful allusion to the religious scruples of the Fisc in § Non negamus, CXV, Ch. VIII, sec. 59. Whether Pompilia should be technically considered

as detained in a prison or place of public custody was a question upon which much argument was expended. But the better opinion seems to be, that the offense of laesa majestas would relate to the violation of a place of actual or strict public custody and would not extend to the home of the Comparini, thus assigned to Pompilia. The consent or acquiescence of Guido in the arrangement does not appear to be material. Guido's counsel, however, by what seems a tactical error, cited cases as to assaults committed in prison on provocation received there, which enabled the Fisc to make an effective reply.

To sum up as to the aggravating circumstances; it would seem that Guido committed the crimes of Conventicle and carrying prohibited arms, and for these reasons the homicide which was admittedly punishable to some extent, was so aggravated that the death penalty was properly pronounced. Irrespective of these aggravating circumstances indeed, Bottini seems frankly to admit the conflict of authorities as to the right of Guido to take vengeance ex intervallo, § Sed quatenus, CXCVIII, Ch. X, sec. 44, and Gambi in his first argument says in effect that Guido's excuse is aside from the real question in the case, which concerned the aggravating circumstances, § Attamen in hac, LXIV, Ch. VIII, sec. 74 and Ch. X, sec. 42.

But if Guido was thus justly condemned for the homicide of Pompilia, how much more worthy of death was he when the homicides of Pietro and Violante are also considered? The Fisc argued irrefutably that the special rights of the husband against his faithless wife on which Guido's case depended could not be extended in his favor against her parents. Archangeli and Spreti strenuously

contended that the same causa honoris should likewise mitigate their client's guilt, and it must be conceded that the conduct of the Comparini (and that of Violante in particular) respecting the concealment of Pompilia's birth, and their suit to effect the annulment of the marriage settlement, must have very justly angered their dupe, especially as their duplicity was followed by their ready reception of Pompilia into their home, which inflicted an additional disgrace upon him. Archangeli and Spreti adduced every argument that ingenuity could suggest, and certainly did their full duty, but the facts as well as the law were against them, so that irrespective of the aggravating circumstances, which, of course, would also apply, there can be no doubt that Guido was justly condemned to death for the homicides of Pietro and Violante.

If Archangeli and Spreti had a difficult task in the defense of Guido, they undertook a heavier burden in their attempt to save the lives of his four associates. Their argument rested, indeed, mainly upon the proposition that the Socii should not be punished more heavily than their principal, and consequently as they failed in Guido's case, it is obvious that his associates could not escape. Yet they presented their case with zeal and acumen, availing themselves of every possible argument in the performance of their duty. As to Francesco and Domenico the special plea of minority was presented, the former of whom was active in the homicides. As to Domenico at least it clearly appeared that he was under twenty-five (the regular age of majority) at the time of the homicides, and an earnest appeal for clemency was made on that ground to the Court, and after conviction to

the Pope, which, however, was denied. Any mitigation of the punishment would have been purely discretionary, and there does not seem to have been any special reason for indulgence. All four accordingly met their death on the gallows.

The only reference that I have been able to find in Italian legal literature concerning the trial of Guido supports the main conclusions to which we have thus arrived. Franciscus Dynus, an Etrurian lawyer and judge, published in 1713 his Decisiones Criminales, of which dec. 22 concerns the case of one Petrus, alias Scorsanus, executed in 1688 for the homicide of his wife. Dynus in his discussion of the authorities that excuse a husband mentions the case of Guido. I translate as follows: "Nor does it signify that D. Guido Franceschini, a nobleman of Arezzo, was beheaded in Rome in the year 1697 (sic) on account of the murder of his adulterous wife, whom he had prosecuted in Rome for adultery and elopement with N., a Canon of the Cathedral of Arezzo, who had been banished for that reason to Civita Vecchia. For Guido after an interval of many months, not only killed his wife, but also her father and mother, from whom he had received an illegitimate girl, that had been betrothed to him, in place of their daughter with a dowry that was promised but not paid. Besides, he had come from Arezzo with a number of assassins, and provided with firearms, and having purposely used a feigned voice, had broken into the home of the victims with the aid of the assassins. And although the 'causa honoris' — and his honor had been completely ruined — made a strong impression on the minds of the Judges, especially because it is thought of much importance among the Aretines, yet the serious

nature of his excess (beyond his legal rights) being considered, and the attendant circumstances that infinitely increased the crime, he was delivered over to death with the assassins. This was done notwithstanding his plea of clergy, viz., that in the Ecclesiastical State subsequent matrimony does not take away the privilege of the Court, as appears in the entire title, de Cler. Conjug., Trivis, dec. 48, n. 22; since in 'most atrocious' crimes the punishment is not mitigated in the case of a clerk, according to the authorities collected at large by Brunor. a Sole, qu. 34, n. 25, and referred to by those whom we have cited in dec. 16, n. 26." (The original Latin will be found at the end of this chapter.)

From this it would appear that there was no doubt of Pompilia's guilt in the mind of Dynus, who was a contemporary of the trial, and that Guido was executed because he had killed Pompilia ex intervallo, and her father and mother as well, with the addition of aggravating circumstances. It will be noticed that Dynus speaks of firearms, and says that the home of the Comparini was broken into, laying stress also upon Guido having feigned the voice (of Caponsacchi), thus making a violent entry per insidias. Yet even then the plea of the causa honoris made a strong impression on the Court. The crime being thus rendered "most atrocious," he lost his alleged right as a clerk to be tried in the Ecclesiastical Court, even if he had not forfeited that right by his subsequent marriage. What clerical orders Guido had taken, does not appear in the record as we have it.

Finally there remained the claim of the Convent of the Convertites to be disposed of. The record

does not disclose whether this claim was the subject of a separate suit, or the Convent intervened in the Prosecution for Elopement; probably the latter was the case. Pompilia by her will bequeathed to her infant son, Gaetano, only the portion to which he was legally entitled, and of which he could not be disinherited; all the rest of her estate she bequeathed to one Tighetti, of whom we know nothing beyond this fact. Lamparelli, as Procurator of Charity, had represented Pompilia in the Prosecution for Elopement against the Fisc, and singularly enough was also by virtue of his office the representative of the Archfraternity of Charity, which had the oversight of the Convertites claiming Pompilia's estate. His position was dual in another respect, for as the Procurator of Charity he was in a measure a colleague of the Procurator of the Poor whose duty it had been in the defense of Guido to show Pompilia's misconduct. We have Lamparelli's argument in favor of the rehabilitation of her memory, but nothing else of the proceedings, and this argument is so closely based on those of Bottini in Guido's case, that many passages are copied literally. The case does not seem to have been seriously contested, nor does any fresh testimony appear in the record as we have it. Guido's representative certainly had no interest, nor had the Fisc; the claim of the Convertites to Pompilia's estate was not a likely one to excite much sympathy. The confiscatory Bulls were obviously intended to apply to the estates of women who were dissolute by profession, not to a case like Pompilia's, and so far as we can judge from the record, the contention of the Convertites appears to have been only formal, yet it required two

votes for the Criminal Court to reach its decree of absolution, which was entered apparently in May 1698, the final decree in default of appeal being on August 19, 1698.

Dynus, dec. 22, n. 47

"Nec facit, quod D. Guidus Franceschinus nobilis Aretinus fuerit Romae anno 1697 decapitatus ob caedem adulterae, quam in Urbe querelaverat de adulterio, & fuga cum N. Canonico illius Cathedralis ob id relegato in Civitate Vetula, quia ille post longum mensium intervallum occidit nedum uxorem, sed patrem, & matrem, a quibis illegittimam, promissa, non tradita dote pro eorum filia, conquerebatur sibi desponsatam, & venerat ab Aretio cum multis sicariis sulphureis armis munitis, & industria usus simulata voce irruperat in domum occisorum, cooperantibus sicariis, & quamvis causa honoris undique labefactati multum animos Judicum impulisset, maxime quod apud Aretinos est multum in pretio, tamen attenta gravitate excessus, & circumstantiis in infinitum gravantibus, fuit cum sicariis morti traditus, non obstante allegatione Clericatus, quod in statu Ecclesiae subsequens matrimonium non adimat fori privilegium ut toto tit. de Cler. conjug. Trivis. dec. 48, num 22, cum in atrocissimis Clerico non esse poenam minuendam conferant late deducta per Brunor. a Sole quaest. 34, sub n. 25, & relatos ab his, quos citavimus dec. 16, n. 26."

(It will be observed that the Canon is not referred to by name but as "N.;" doubtless in order to observe the respectability of his station.)

CHAPTER XIV

THE OLD YELLOW BOOK AND THE RING AND THE BOOK

We now turn to Browning's treatment of the story of the Old Yellow Book. It may be remembered that in the beginning of this book, the purpose and method of Browning were stated from the first book of his poem. Browning there claimed to use the crude fact of the Old Yellow Book, mingling it with his poetic fancy, as the goldsmith Castellani would mix his gold with alloy to fashion his Etrurian ring, finally dissolving the alloy in order that the golden fact might appear in an artistic form. But after the first book of the poem Browning proceeds to develop that wonderful series of monologues in which the Roman public from three different viewpoints, and all the principal actors in the drama, each from his own, retell the story of the Book with every possible variation that Browning's fancy could invent, and with all the self-analysis in which Browning's genius delighted. We might indeed look in Book X for the Pope's summing up of the actual truth of the case, for he is depicted, contrary, however, to his real functions, as the final arbiter or court of appeal; but we look in vain, we only find the world-weariness and the sin-sickness of an aged man, with face turned to his own grave; and his incidental pronouncements upon the characters and deeds of the actors are very far from the foundations of fact in the Old Yellow Book. And

in the last book, when Browning reverts for a moment to his metaphoric ring, his impotent conclusion, the lesson that the British Public is invited to learn, is merely

> "that our human speech is naught,
> Our human testimony false, our fame
> And human estimation words and wind."

And he adds, by way of anticipating a very natural inquiry:

> "Why take the artistic way to prove so much?
> Because it is the glory and good of Art,
> That Art remains the one way possible
> Of speaking truth, to mouths like mine at least."

And he sums it all up by saying that Art may tell a truth obliquely, do the thing that shall breed the thought, and so write a book that shall "beyond the facts, suffice the eye and save the soul beside."

As Dowden well says in his Preface to The Ring and the Book, "If we are to accept Browning's metaphor of the ring shaped from untempered gold with the help of alloy, we are compelled to reverse the meaning of the metaphor as set forth by the poet; the gold is contributed by Browning's imagination, the alloy is the fact or the alleged fact as contributed by the Book." The consequence is that at the end nothing remains but Browning's imaginative interpretation of the affair, by which, Dowden says, he valued the assertions of the several parties; nothing, indeed, except his somewhat futile conclusion that human testimony is false, a bold statement, with which some of his admirers are abundantly satisfied.

Mrs. Orr thus paraphrases: "Art with its indirect processes can alone raise up a living image of that truth which words distort in the stating," but what this means does not seem very clear.

This dictum of Browning's concerning the value of human testimony, like his sneer about the "patent truth extracting process," is echoed even by so distinguished a critic as William Lyon Phelps, who says in his excellent book that tells us How to Know Browning, p. 59, "At the very end of The Ring and the Book, Browning declared that human testimony was false, a statement that will be supported by any lawyer or judge of much court experience. Human testimony being worthless, there remains but one way for the poet to tell the truth about humanity, and that is through his art. * * * The highest art is the highest veracity, and this conforms to Browning's theory of poetry." This can only mean that in poetry, art is superior to truth, from which I would dissent, and if this is Browning's theory it seems inconsistent with his expressed intention of his quest for truth. Perhaps he is like Ferishtah, who after mixing up the beans and speculating on their color, could not at last tell black from white.

The sounder view is that of Louis Etienne, the brilliant French critic quoted by Miss Elizabeth Luther Cary in her work on Browning (Chapter of French Criticisms). Etienne has well analyzed Browning's methods and results and I copy a few sentences. "Mr. Browning has attempted to do for Pompilia's murder what the ingenious goldsmith does every day for his rings; he has unearthed a book containing the documents of that old affair, and has thought that by mixing with them the alloy of his imagination he could make a dramatic poem

in which his talent should expand over a quantity of animated and pathetic pages. Up to this point all goes well; he is within his right and he keeps his promise. The poetic ring is finished, is brilliant and the precious metal is not lacking; but the author believes he has attained pure gold — that is to say, reality. He gives to poetry the pretension of discerning the truth in a case where human judgment can but doubt, and he has undertaken to prove his general proposition by the instance of an ancient trial. He deludes himself. Where is the acid that shall disengage from his works its element of poetic fiction? Had he found it, it must simply have annihilated his poem. When truth is to be sought, the 'ring' must be laid aside for the 'book'."

Professor Phelps says that Browning's statement as to the falsity of human testimony will be supported by any lawyer or judge of much court experience, but I think this is entirely too sweeping. Human testimony as we see it in the courts is frail, as is everything human, and often intentionally false, but on the whole the cases are comparatively few in which at their conclusion the truth cannot be found with a reasonable degree of probability, and in the vast majority the truth appears with practical certainty — even if with the aid of "the patent truth extracting process."

So far then as the facts of the Old Yellow Book are concerned, we see that Browning produced at the end of his book, not the pure gold of truth but the gilded ring of his imagination. So far as concerns the personages of the story we shall find that Browning has failed also to reproduce their characters as they really were.

When a novelist introduces real men and women into his poems, and there is no reason why a poet should not be subject to the same limitations, he may properly be allowed a certain latitude in his delineation of his characters and a certain freedom in the invention of imaginary events, in the manipulation of the dialogue, and in many other matters that move in the artistic development of his theme. But he must within somewhat elastic limits be true to his originals. These may be embellished in the story, but not distorted, they may be viewed from different angles, but the perspective must be preserved. Otherwise instead of a portrait, more or less idealized, we have a caricature, or instead of a narrative, we are given a panegyric or a libel. Guido, Pompilia, and Caponsacchi and the others were real persons, of whose sayings and doings we have a real account. Guido was merely a weak and avaricious man, vicious by force of circumstances as well as from inherent defects of character. Pompilia was an ordinary girl, deprived of advantages in childhood, with sufficient good looks to attract, and insufficient character to resist temptation, and with instincts stronger than her principles. The victim of an unhappy marriage, she is an object of compassion rather than of admiration. Caponsacchi was a frivolous young fellow, on the lookout for adventure, light in thought and unscrupulous in action. Browning on the contrary has depicted Guido as a human monster, sunk to the level of a brute; Caponsacchi is a soldier saint, a chivalrous priest, a Christian hero, a true Saint George. Pompilia is perfect in whiteness, the paragon of virtue and purity, and strangely enough Browning is reported to have

said, "I found her in the book just as she speaks and acts in my poem."

Other writers have followed Browning's lead. Sir Frederick Treves has idealized Pompilia as the Madonna of Filippo Lippi, which forms the beautiful frontispiece to his beautiful book. He calls Guido a woeful degenerate, who combined some of the shrewdness of an epileptic with the domestic attributes of the Bushman, a crawling ruffian, malicious as a wounded snake. Sir Frederick and others charge Guido with having deliberately plotted against Pompilia to have her compromised by Caponsacchi, in order that he might cast her out, for which there is no foundation in the Old Yellow Book.

Scott in his great novels has much more properly observed the limitations to which I refer. His delineations of Prince Charles Edward in Waverley and Redgauntlet; of Richard Cœur de Lion in Ivanhoe and The Talisman; of James I in the Fortunes of Nigel, and Louis XI in Quentin of Durward, not to mention others, retain the main characteristics of his subjects. His personal preferences and even prejudices appear indeed, as it is pardonable and perhaps inevitable that they should, but upon the whole he is not unfair, and the impression that one retains after reading these historical romances is not altogether a false one; Romance has not altogether submerged History.

It will require no argument to show to any one who has read the foregoing pages, that Browning had no acquaintance whatever with the law of the Old Yellow Book, and apparently had no desire to acquire it. He does seem to have consulted

Farinacius to satisfy his curiosity as to the torture of the Vigil, but he certainly did not make any examination of the references made by counsel to the legal authorities, without which it is impossible to understand the Old Yellow Book. There are some of them at least which he might easily have consulted, or have had others consult for him, and although many of them are now somewhat rare, even in Italy, he could readily have turned to the fundamental texts of the Corpus Juris, which may be found in any library. Yet his ignorance of the subject was so profound that he alludes to l. Gracchus C. ad leg. Jul. de Adult. (Codex 9, 9, 4) as Gracchus' law, as though Gracchus was its author. Law and lawyers alike he regarded with contempt and even scorn, yet these were necessarily involved in the subject which he of his own volition selected for his poem, and he devoted two entire books to the "arguments" of counsel. It is a dangerous thing for any one, no matter how brilliant he may be, to meddle with what he does not understand, and it is a foolish thing to ridicule it. The consequence was that these books are not only false but silly, and many of even his most ardent admirers consider them to be serious blemishes.

The story of The Ring and the Book is not very attractive from one point of view; as Miss Agnes Repplier says, there is nothing oppressively respectable about it, yet I, as a member of the Mid-Victorian Society of Philadelphia, need have no more scruple than had Browning in selecting it for my subject. Carlyle, as we are told, remarked that the poem was a "wonderful book, all made out of an Old Bailey story that might have been told in ten lines and only wants forgetting," a characteristic

dictum indeed. But the poem's length may be forgiven, and its subject of wounded honor is excusable, for it is one of those questions in law and morals which are perennial, in that it continually recurs in all ages and in all societies, and perennial also in that it ever remains a question in spite of all that has been said or decided. The question primeval will not stay answered, as it involves in its root the whole problem of the relation of the sexes. After more than two centuries the Old Yellow Book is still new. Pompilia, Guido, and Caponsacchi even to-day may prove a theorem in plain trigonometry. To be sure, they, the personages of this drama, were not high mortals, they were all uninteresting and commonplace enough, but they illustrate the course of poor humanity quite as well as they would had they been distinguished by something more than their follies and crimes. For anatomical purposes the cadaver of a pauper or a convict will embellish the dissecting room as well as the body of imperious Caesar dead and turned to clay, and the persons depicted on the pages of the Old Yellow Book exhibited all the passions one is likely to see anywhere in life; avarice, lust, jealousy, anger, envy, malice, revenge, whence follow falsehood, trickery, theft, adultery, homicide, assassination.

> "Let this old woe step on the stage again!
> Act itself o'er anew for men to judge."

Why did Browning elect, and necessarily with apparent deliberation, not to treat the great questions actually presented in this case? It could not have been that he lacked the intellectual ability to master them. The mere suggestion is an absurdity. It could not have been that he shrank from the labor that would have been necessary.

The man who wrote this poem in twenty-one thousand lines would lightly estimate mere toil. As Kipling says in his parody, "The Flight of the Bucket:"

> "H'm, for a subject it is well enough,
> Who wrote 'Sordello' finds no subject tough."

It could not have been that he felt himself unable to treat these problems by the medium of poetry. All material, however rigid, would be malleable in the fire of his genius, and easily moulded into a rounded ring.

It might have been that he assumed the questions which the lawyers argued to be mere figments of an advocate's imagination, and not actual problems vitally connected with the relations of living men and women, and the administration of justice.

It might have been, perhaps we may say it must have been, that Browning deliberately chose to ignore or rather to distort the real facts of the case, to transform a pretty but foolish and susceptible girl into an angel of Thalassion purity, and to create a chivalrous guardian of feminine virtue out of a selfish and intriguing corrupter of the home, and that he did this simply for the sake of producing at the sacrifice of truth, the discovery of which he proclaims as the kernel of his poem, an elaborate shell whose intricate carving would be a greater artistic triumph. He might have accomplished the latter result without neglecting the first. He might have done much more which he failed even to attempt. He missed the opportunity of portraying the majesty of Law, as the controlling force, the saviour of human society, ruling and overruling the passions of men and women, even

the strongest of all, the sex impulse; he might have shown the relationship of law and justice, the sanctity of marriage, the thirst of a wronged man for revenge as opposed to the all important necessity of the preservation of human life except where society under the authority of law demands its forfeit; he might have shown the growth of law from custom, and how our modern criminal law was slowly developed from the primeval idea of self-redress and vengeance. And he might further have shown the tremendous responsibility of those who as lawyers have to do with the administration of the law and who acting as ministers of justice and as the conservators of society bring before the constituted tribunal all the facts developed from the testimony, every statute applicable thereto, and every precedent evolved by the wisdom and practical experience of the past, in order that they may be weighed in a righteous balance by an impartial Judge, and that justice may be dealt with an even hand.

The poet might also from the story of Pompilia, the nameless waif, and Caponsacchi, the degenerate descendant of a noble house, have elaborated the themes of moral responsibility and hereditary tendencies, the effect of education and environment, and the problem of the extent to which the law can or should ordain a universal rule, and how much excuse there often is for human error and for human sin.

As we close this Old Yellow Book with its record of meanness and crime, we turn back to the lonely figure of poor little Pompilia, in whom we see not an angel of light, but a frail and faulty girl, whose pathetic fate cannot but excite our compassion. But this is an unsympathetic world

which will not permit its laws and customs to be violated with impunity; many before Pompilia was born, and many others after she died, have found this out, and many more in the future will make the same discovery.

Pompilia tried her experiment, and failed. Poor Pompilia!

In the words of a distinguished poet and novelist:

"So there ends the tale,
With a hey, with a hoy,
So there ends the tale,
With a ho.
There is a moral. If you fail
To seize it by the tail,
Its import will exhale,
You must know."

APPENDIX No. 1

A TRANSLATION OF THE ARGUMENT OF PROSPER FARINACIUS IN DEFENSE OF BEATRIX CINCIA (BEATRICE CENCI) AND HER RELATIVES AS FOUND IN HIS PUBLISHED WORKS, CONSILIUM SIXTY-SIX

This translation is based upon that of George Bowyer (afterwards Sir George Bowyer) in his Dissertation on the Statutes of the Cities of Italy, &c. London, 1838.

1. May God be with me. Holy father, although Beatrice Cenci impiously procured the death of her father, Francesco Cenci, yet if it be true (as it is believed to be very true) that Francesco by confining Beatrice in the castle of Petrella (where he was killed) in its gloomy and hidden rooms like a prison, and by there badly treating her, endeavoured to overcome her chastity, it will not be contrary to law to hold that she is deserving to be judged with some degree of clemency. For it is most clearly established law that the penalty of death affixed to the crime of parricide is not applicable whenever parents kill their children, or children their parents, from one of the fourteen causes which legally justify disinheritance, and which are treated of in the Authentica, ut cum de appellatione cognoscetur, § caussas autem.

The text upon which this position is founded is L. Divus Adrianus ff. de parricidiis. Though the law speaks expressly of a son killed by his father because he had carnally known his stepmother or his father's concubine, yet it is extended by construction to parricide committed in any one of the cases of "ingratitude" comprehended in the already cited Authentica, according to the opinion of Bartolus and Angelus, and Jason upon the law jus autem civile, num. 28 ff. de just et jur., Petras sing. 2 num., 8 vers. adde tamen; Carrer in pract. crim. in verbo poenis debitis feriantur num. 27; Petr. a Plaz. in Epit. delict. cap. 22. num. 28; Pract. Conrad. tit. de homicid. num. 14. in 22. limit.; Menoch. de arb. quest. lib. 2, casu 356 et seqq. All these doctors expressly and with one voice hold, upon the

before mentioned law Divus Adrianus, that in such cases the penalty of natural death is not applicable, but that either deportation or some other penalty is to be inflicted, at the discretion of the judge.

2. But that to attempt the chastity of a daughter is legally a grave and infamous outrage, and is consequently comprehended among the cases enumerated in the before quoted Authentica, ut cum de appell. cogno. as within the words "si gravis et inhonesta injuria eis ingesserit," and that such an outrage is greater legal "ingratitude," and a greater crime than the offense of a son corrupting the concubine of his father, or his own stepmother, which is expressly provided for in that Authentica in these other words, "If he shall have misbehaved with his stepmother or his father's concubine," it is impossible to doubt, upon the authority of the cited doctors, who affirm that if a father is guilty of legal ingratitude towards the son, or the son towards the father, in both cases the legal quality or privilege of father or son is forfeited by the offender respectively.

Therefore much more does a father lose his paternal rights who attempts the chastity of his daughter, for by that outrage he makes himself not her father, and shows himself not to be truly her father, as it is argued by Albericus, who is followed by Marsil. on the L. inauditum suum, 2 ff. de sicar. & sing. 160 incip. Pater et filius, and by Boerius decis. 318 post num. 2. He there shows, by the writings of the ancients, that the conjunction of parents with their offspring seemed horrible even to irrational animals, and hence many ancient examples are related in which parricide committed under such circumstances as those of the present case remained unpunished in old times, as in Caelius, lib. 12, cap. 27, and Justin. lib. 1, where we read of Semiramis killed by her son Ninias because she desired incestuous love with him; and in Plutarch, in Paral., we read of Cyane, who stabbed with a sword her father Cyamnus because he had debauched her, and of Medullina, who, having been violated by her father Aruntius while he was intoxicated, put him to death; and in Cicero, pro Milone, of Orestes who had killed his mother for her crimes, and was first condemned by half the number of his judges and absolved by the other half, but was finally acquitted by Minerva.

3. But the text of the law 1, § fin. ff. de sicar. seems the more to furnish an excuse for this most unhappy woman. In that law it is provided that any one putting to death another who is attempting violence of this kind upon him, or those near to him in blood, is to be acquitted of any guilt, and the Gloss upon the word dimettendum in that law cites the L. isti quidem, ff. quod metus causa, in which it is laid down that the dread of violation is greater than the dread of death. The Glossator also cites the text in the L. 3, § quod ait praetor, in fin. ff. de incend. et ruin. et naufrag. In that law we find that that is not held to have been wrongfully done, which was done in self-defense by one who could not otherwise defend himself, and upon this point those things are relevant which are to be found in Carrer. in pract. crim. in tract. de homicid. § Vigesimosexto excusatur. There after other matters upon the same question, he comes to the general conclusion that the law excuses the slayer of any one who attempts to know by force either the said slayer or any one related to him; and you may read in Valerius Maximus lib. 6. c. 1. de pudic. rubr. 12, that C. Marius Imperator decided that C. Lucius Nepos was lawfully killed by C. Plotius, a manipulary, on whom C. Lucius had dared to make an atrocious attempt. Thus also we read in L. 2, § init. ff. de orig. jur. that Virginius was acquitted of the homicide of his daughter, though she was innocent and free from blame, because he killed her to save her from the brutality of Appius. It follows then, that Beatrice Cenci is much more to be dealt with indulgently by the law for killing her father, who was a criminal, and endeavoured to overcome her chastity.

4. Nor let the Fisc argue that Beatrice, if her chastity had been attempted by her father, should not have slain but should have accused him, as it seems to be pointed out by the text in L. inauditum ff. ad leg. Cornel. de parricid.; for not only was she deprived by her father, who kept her imprisoned in closed rooms under key, of the power of preferring an accusation against him, and [but] she did frequently send letters to her relatives, in which she complained in general terms of the cruel treatment which she suffered at the hands of her father, and begged for their assistance; and memorials were therefore even then presented on her behalf to the Holy Father and these things are believed to be conclusively proved. But independently of

these things, the argument may be answered in a single word, for the text L. divus ff. de parricid. enacts that in such case the parricide is not to be released unpunished, but to be punished by deportation, because he killed instead of accusing the parent; for if he had not killed but only preferred an accusation there would be no penalty whatever to be awarded, as it is judiciously observed by the Glossator on the said law divus, versic. relegatur ergo.

5. Nor let the Fisc argue (I seem to see him thus replying to me) that the foregoing legal positions would be applicable if Beatrice had laid hands upon the deceased Francesco Cenci at the very time of his committing or attempting the alleged crime, but that it is otherwise if the homicide is committed after the violence has ceased; as indeed was the case, since she procured his assassination by means of another person. For it is a sufficient answer, that the very text in L. divus Adrianus ff. ad leg. Pomp. de parricid. expressly speaks of parricide committed after the lapse of a space of time since the outrage was committed; for in that law the case is put of a father killing his son, not when taken in the act with his mother, but while hunting in the woods, and therefore after the commission of the crime; and yet the law imposes not the penalty of death, but that of deportation, as taking into consideration his just resentment. And this is well argued by Decian. in his Tract. Crim. tom. 2, lib. 9, cap. 8, rubr. de ascendentibus descendentes occidentibus, num. 11. It is there tacitly implied that if the father had killed the son in the very act, he would have been liable to no punishment whatever, and this was the opinion of the Glossators on the L. Divus, in fine. and that opinion is expressly given by Bartolus and Angelus and many others, cited by Bertaz, consil. 356, num. 16, lib. 2. And this position is confirmed by those things written by Afflictis in constit. si maritus n. 2 and Carrerius in Pract. Crim. in tract. de homicid. versic. excusat, num. 5, where, after other things to the same purpose, he comes to the conclusion that just resentment (justus dolor) mitigates the penalty even where the homicide was committed after a lapse of time since the provocation.

6. But in the case of one committing homicide through fear occasioned by danger of violation, it is laid down by the Glossators on the law isti quidem, and L. metum in 1 Gloss ff. quod met. caus., and is proved by the text in L. 1 ff. eod.

tit., that this fear need not be caused by immediate, but may be occasioned by future danger (as indeed Beatrice always was in this danger), for that text says that fear is to be understood to signify a perturbation of mind arising not only from present, but even from future danger. It follows, then, either first; that whatever Beatrice may have done she must be held to have done by reason of danger and fear of imminent or future violation, and she is on that ground deserving of legal excuse, as having committed homicide in the defense of her own honor, Clar. in Pract. § homicidium versic. idemque; Asin. Consil. Crim. diversor. 114, num. 2 et sequ., lib. 2, or, secondly; if perhaps Beatrice was actually violated, and had killed her oppressor, avenging thereby the outrage committed upon her, she is likewise also legally excusable on account of her just resentment (justum dolorem) even if she killed him or caused him to be killed after a lapse of time in accordance with the authorities before cited. And this is my defense in behalf of Beatrice.

7. With regard to Bernardo Cenci, who is also prosecuted for parricide, as having confessed that he gave his consent to the negotiation concluded by Olympio the assassin with Giacomo Cenci, I first place before the eyes of your Holiness his tender and minor age, for at the time when the crime was committed he had only reached his sixteenth year (as the facts have been represented to me), and this fact leads to the application of the legal conclusion, that though in criminal cases minors have not the benefit of restitutio in integrum, so as to be excused from all punishment, L. 1 Cod. si advers. delict., L. si ex causa § nunc. videndum ff. de minor., yet merciful consideration is to be had of that age, and the penalty of the crime is to be mitigated; L. fere in omnibus ff. de reg. jur., L. aut facta, § persona ff. de poenis; Clar. in Pract. § fin. quaest. 60 in princ. And that legal conclusion is applicable to the case of every species of crime; dict. L. fere in omnibus ff. de reg. jur., L. aut facta § persona ff. de poenis, and even to graver and more atrocious crimes, as is shown by Alberic. in L. auxil. § in delict. num. 3 ff. de minor.; Joan. de Anan. in cap. 1, num. 8, in fin. in Gloss. fin. de delict. puer; Gulielm. Mayner. in L. fere in omnibus num 14; Aret. in § in summa, num. 1, Inst. de oblig. quae ex delict. nascun. and in tract. de malefic. in verbo scienter et dolose, post num. 12; Gerard. Mazzon. consil. 64, num. 1, in fin.; Roland. Consil. 7, num. 8, lib. 3;

Franc. Calder. in repet. L. si curatorem, in ver. vel adversarii dolo, num. 61, Cod de in integr. restit. minor.

8. It also appears to be the commonly received opinion of the doctors that nonage is a lawful cause for mitigating the punishment of many most atrocious crimes; as, in the crimen raptus, it was answered by Cumanus, in the case of a youth below eighteen years of age, consil. 95 incip., Christopherus ad fin. versic. et haec benignior sententia. And Cumanus was cited and followed by Rolandus consil. 77, num. 9, lib. 3; Hippol. Riminal. Consil. crim. diversor. 135, num. 16, tom. 1. And as respecting the crime of incest, we have the text in L. si adulterium cum incestu, § fratres, ff. ad. leg. Jul. de adult., upon which text the same position was held by Novel. in tract. ad defensam part. num. 37; Maurit. de restit. in integr. cap. 153, num 5, in fin.; Roland d. consil. 77, num. 7, lib. 3; Menoch. De arbitr. quaest. lib. 2, casu. 329, num. 3. And in the crime of sodomy in the case of one less than twenty years of age this was advised by Soccin. jun. cons. 7, lib. 3, who is likewise cited and followed by Hippolyt. Riminald. cons. 135, num. 18; Roland cons. 77, n. 9 versic. sextodecimo accedit. And in the case of the crime of counterfeiting coin, which is included in the crimen laesae majestatis, we have the text of the law, 1, § impuberes Cod., de fals. monet. There it is provided that persons below puberty are absolutely excused by the law. But in the case of those who had reached the age of puberty, it was held that they likewise are to be excused from the ordinary penalty by Caccialupus Consil. crim. diversor. quaest. 5, num. 3 in fin. et seq. tom. 1, and that opinion was followed by Rolandus dict. consil. 77, num. 9, sub. versic. decimooctavo, and Hippolyt. Riminald. Cons. 245, num. 24, lib. 3. From these authorities it appears that nonage is commonly held to be a plea for excuse from the ordinary penalty even in the most atrocious crimes.

9. Nor is the motus proprius of Pius IV, enacting that in cases of homicide nonage shall not be pleadable where the culprit has completed his fourteenth year, in derogation to the legal doctrines which I have established; for in the first place it may be answered to that position that this motus proprius speaks of outlawed persons (in bannitis) and persons condemned in contumacy, and must therefore not be extended to persons not outlawed and not condemned in contumacy. And, notwithstanding this law, the judges are

not disabled from granting a mitigation of punishment on the ground of nonage, as was proved by Sforz. Odd., upon the construction of this motus proprius, de restit. in integr. part 2, quaest. 81, num. 33 et sequ., and this is broadly laid down by Honded. consil. 96, num. 48 et seq., where in the latter part of his consilum he affirms that it was so decided at Perugia in the year 1583.

10. I answer in the second place that the motus proprius speaks of homicides, and it is therefore not to be extended to participators and consenting parties, as it is argued in the case of a similar Bull by Corneus, cons. 159, lib.1; and the same doctrine was held upon this very constitution by Flamin. Cartar. de execut. sentent., cap. fin. num. 233. There, after citing other authorities in agreement, he asserts the general opinion of the doctors to be that statutes touching homicides are not to be extended to consultors, advisers and accomplices.

11. Nor can these arguments be answered by saying that this is a case, not of simple consent or counsel, but of mandatum, in which case a statute concerning the delinquent is to be extended to the mandator, on the ground that the mandator and the mandatarius are liable to the same punishment, L. non solum, § si mandato ff. de injur.; L. Cornel., § fin. eod. tit., and that he who does anything by means of another is held to have done it himself, L. 1, § dejecisse ff. de vi et vi armata; L. ita autem, § gessisse ff. de adm. tut, and many other similar texts of law. For to this answer it may be replied, first that the rule that the (mandator and) mandatarius are liable to the same penalty refers to the legal but not to the statutory penalty. For the mandator is held to commit the crime, not truly and in fact, but by construction, and, therefore, a penal constitution speaking of the person of the homicide (as is the case with this Bull) does not comprehend the mandator; though it might, perhaps, be otherwise if the constitution had spoken in rem and punished, not the criminal (homicidam) but the crime itself (homicidium). And this authoritative doctrine was taught by Bartolus in L. haec verba post, n. 1, ff. de. adult. et in 1. aut qui aliter, § haec verba per illum text. num. 3, and by Alexander especially, upon the same text, in addit. in fin. ff. quod vi aut clam. And this doctrine has been generally followed by the doctors, as may be seen in Jason, who after referring to the opinions of others, thus

testifies to the common view, in L. si quis id quod, num. 36 ff. de juris. omn. jud.; Afflict. decis. 404, num. 6; Boss. in tit. de poen., num. 14.

12. But I further reply in the second place (and may your Holiness deign to take this most specially into consideration), that Bernard did not confess that he was a principal author of the parricide that followed, but said merely that he was conscious of, and a consenting party to, the previous agreement between Beatrice and Olympio the assassin. This is clearly shown by the very express words of Beatrice in her confession of the crime; she says, And I said to Olympio that I would not have anything done, unless with the consent of my brothers, namely, Giacomo, Bernardo, and Paolo, and so Olympio remained and agreed that he would go himself and speak to them, and he said to me, "Your brothers will very well agree." And a little further down she said, "And when Olympio returned from Rome, he said to me, that he had spoken to Giacomo, and that he had not spoken to the others, because he had not chosen to have to do with boys." And with this the confession of Bernardo himself agrees, for he says, "Olympio spoke with my brothers Giacomo and Paolo, and said he had resolved to kill our father because he had wounded his honor, and had insulted him at the castle; and that, moreover, our sister Beatrice had reason to complain of our father, who kept her so imprisoned, and that she would not put up with that life any longer, and that, therefore, she had resolved to put him to death, and that she wished Olympio to do the deed, and that Beatrice wished that it should be done with the consent of Giacomo, Paolo, and me; that is to say, she wished that we should know it before the thing was done, and that we should be well content that it should be done, and that therefore he had come to Rome to know our will. And Giacomo, Paolo, and I told him to do what he pleased, as has been said by the Signor Giacomo." Wherefore it follows as Bernard gave no mandatum, but confesses only to have given consent, the argument of the Fisc is according to the fact inapplicable, namely, that the constitution punishing the delinquent is to be extended also to the mandator.

13. But again I submit to the consideration of your Holiness the fatuity and the imbecility of the intellect of this youth (which also is believed to be proved) and which

render it not astonishing that giving way, in all probability, to the influence of his brother Giacomo, he should have been persuaded to give his consent and his acquiescence to the arrangement made by Giacomo with Olympio the assassin. Therefore by reason of this imbecility and fatuity of mind, added moreover to his tender age, he should in my opinion be excused from the ordinary punishment; for in law that effect is produced not only by absolute insanity, but by any debility and defective state of mind. And the doctors, in treating of these matters, speak indiscriminately, not only of maniacs, but of persons insane, fatuous, out of their mind, phrenetic, melancholy mad (maliconico) and mente capti; and every other variety or affection of the same kind, as is shown by Alexander in L. ex facto, num. 34, ff. de. vulg. et pupill.; Marian. Soc. in cap. ad audientiam, num. 28 ad fin. de homicid.; Blanch., in Pract. Crim., in § imbecillitate etiam, num. 11; Gram., consil. 16, num. 7, in fin. et sequ; Clar. in Pract., § fin. quaest. 60, versic. item quaero, and the same writer passim, and the authorities in general.

14. Holy father, I should not omit to say, that though the confession of Bernard may be generally true, yet it is not to be argued, that as it came forth without the use of torture and upon a mere confrontation with Giacomo, it is to be considered as it were a spontaneous confession; for we have the remarkable words of the text, in L. si quis ultro ff. de. quaest., since it is there said si quis ultro de maleficio fateatur. non semper ei fides habenda est. For sometimes accused persons criminate themselves by confession, through fear or some other cause; and the fear of torture very probably induced this boy to confess in the manner in which he has confessed, as he might, very naturally, have believed from what was said to him by Giacomo, that he would be put to the torture, as Giacomo was tortured. And thus both his immature age and his imbecility of mind may also, very probably, have contributed to make him confess as he in fact has confessed. For upon the same principles upon which a person laboring under a defect of intellect should by law be excused, if he commits a crime, as I have shown, so even if he confesses it his confession is not to be taken as conclusive. Bald. consil. 347, num. 4, lib. 5; Igne (Jean Feu or Johannes Tyneus) in L. 3, § ignoscitur, num. 75, in fin. ff. ad Syllan; Foller. in Pract. Crim., in 1 par. 3 princ. verb. et si confitebuntur, num. 28, page in my copy 297.

15. But there is another and very powerful argument, for the aforesaid confession was made upon Bernardo being named by Giacomo on confrontation with him, and yet when Giacomo confessed his sins to a priest, and when the priest refused to grant him absolution unless he would, as far as lay in his power, revoke and deny what he had falsely said to criminate others, he solemnly and in writing exculpated the said Bernardo; and that exculpation was, as I am informed, for the relief of his conscience transmitted to the most illustrious Lord Cardinal of Alexandria, that he might certify it to your Holiness. Now, though I am aware that exculpation does not destroy full proofs (plenas probationes) of the crime, and much less the express confession of the party himself, yet it cannot be denied that it does weaken those proofs, and that confession, as is shown by Grammat. vot. 3, num. 15, and vot. 11, n. 11 in fin.; Marsil. consil. 109, num. 30 et sequ; Tiber. Decian. consil. 18, n. 65, et seq.; Hippol. Riminald. cons. 420, n. 17, lib. 4. But these last arguments respecting the confession of Bernard are mentioned from abundance of caution, for it is sufficiently clear that, on the grounds before urged, namely, nonage and mental weakness, he is legally exempted from the ordinary punishment.

16. With respect to Lucretia, the widow of Francesco Cenci, it is our supplication to your Holiness that you will take into consideration her confession according to its truth as it appears in the record. For it is the truth, that though at first she also did consent to the perpetration of the parricide by means of the assassin, and by the order and direction of her daughter Beatrice, and perhaps even by that of Lucretia herself, yet she did revoke her consent or direction before anything had been attempted by the assassins. And indeed, she earnestly implored the assassins, on the day before the crime was committed, to abstain from the perpetration of so dreadful an outrage, and made them leave the rooms where they had been placed to accomplish the crime, with the purpose and intent that they should not proceed further with the crime. But on the day after, without the knowledge of Lucretia, and persuaded by Beatrice alone, they returned and assassinated Francesco Cenci. Thus, and not otherwise, does she herself confess, and her confession is corroborated by the depositions of the assassin Marzio and Beatrice. Here, then, is applicable the

legal doctrine that where a mandator revokes the mandate, though the crime is afterwards actually committed, yet he is no longer liable to punishment for the crime, or responsible upon the mandate; text in cap. quicumque ibi "nisi licentiam re integra revocarent," de sent. excom.; Bart. in L. non solum, § si mandato, num. 12 ff. de injur.; Angel. de Malefic. in verbo, Sempronium mandatorem n. 15; Blanc. caut. 7, num. 2, post Pract. Crim.; Menoch. de arbit. quaest. lib. 2, casu 357, n. 7; although the mandator did not make known the fact that he had revoked the mandate of killing; August. ad Ang. de malefic. ubi supra sub num. 15, vers. quinimo; Pract. Corra. tit. de mandante homicidium, n. 6.

17. And though it may be argued that the wife deserves punishment merely for not discovering to her husband that his life was conspired against, yet that argument should be understood of the extraordinary punishment of relegation, and not to the ordinary punishment of death, as is shown by the text, L. frater ff. ad leg. Pomp de parricid., and by de Marsiliis upon that text, where he draws a general conclusion that a capital punishment is never awarded in cases of non-revelation except where the crime was to be committed against the Sovereign or the Pope, and that this exception is not extended to any other case, even of those which are comprehended under the name of parricide.

18. There are many more arguments to be pleaded in favour of Giacomo, but I am compelled for the want of time to omit them, leaving them to the other doctors who are writing in his defense. I will only add this, that if Beatrice, his sister, who was the principal agent in the commission of the crime, is deserving of some indulgence on account of the reason which she had for her deeds, it follows, that he who was merely a partaker in and cognizant of the crime cannot lawfully be condemned to a more severe punishment than the principal, according to the rule "agentes et consentientes non dispari sed pari poena debent plecti." This rule is applied in L. si quemque C. de Episc. et cleric. and in L. quisquis C. ad leg. Jul. de maj. and many other laws, cited by Boss. in tit. de mandat. ad homicid., num. 59, and by Clar. in Pract., § fin. quaest. 88 in princ.

19. Holy father, these things I have submitted to your Holiness currenti calamo, on account of the brevity of the time, in this so difficult cause committed to me, that

you may feel at liberty to grant some mitigation of punishment, and exercise your clemency and pity in favour of those most miserable prisoners, who do not rest upon the favourable sentence of the judge, nor the mercy of the advocate of the Fisc (of which, however, they have a confident hope) but await upon their bended knees and with the most profound submission the judgment of your Holiness.

The argument ends here, but there is a note by Farinacius to the following effect:

They were all punished with death except Bernardo, who was condemned to the galleys, with confiscation of all his property, and also to be present at the execution of the others, and accordingly he was thus present. For their crime was so horrible and unheard of, namely, two sons and a daughter and a wife conspiring to murder their father and husband, and that by means of a paid assassin, that it may be well said that it was only through the greatest clemency of the most holy Pontiff, that Bernardo, being a minor, was saved from death, as, indeed, it was confidently hoped would have been the case as to his sister Beatrice, if she had proved the defense which had been put forward for her, which she did not in fact prove. Praise be to God.

ADDITIONS BY FAMIANUS CENTOLINUS, U. J. D. GALESII.

This Bernardo Cenci, who consented to the death of his father, Francesco, was freed from death not only on account of his minority, but also because he was reported to be in fact almost weak-minded and foolish to such an extent that through the aid of his exculpation by his elder brother, Giacomo (who before that had inculpated him, by reason of which inculpation the said Bernardo had been led to confess), his confession should be somewhat doubted; and all these things concurring, it should not appear wonderful to you, if by the aid of the clemency of the most Sacred Pontiff, he escaped death. Otherwise, I scarcely believe it would be held that minority alone would have been sufficient in this crime to mitigate the punishment, since there are not wanting authorities who (whatever different opinion they

have entertained in "atrocious" or "more atrocious" crimes) have very distinctly affirmed that the penalty should in no wise be diminished on account of minority in the "most atrocious" crimes. Gloss in l. fere in omnibus in gl. 1 vers. aut atrocissima ff. de reg. jur.; where in that case it is held minority is of no avail, and Pet. de Bellapert. seems to be of this mind in L. 1 C. si advers. delict. col. 2 ver. si autem quaeritur de criminale, and Cyn., n. 1, ver. si de atrocioribus, who illustrate it in the crime of adultery; and the Glossator in Gloss in L. auxilium, § in delictis, in verbo atrociora, in fi. ff. de minor. adds others, where he said that in the "most atrocious" crimes the minor can in no way be helped; Anchar. in c. 1, n. 4, vers. si de atrocioribus, de delict. puer.; Gandin. in tit. de poen. reor. n. 30, vers. aut est atrocis simum; Duen. reg. 259 in 2 limit.; Placha in Epit. delict. c. 32, n. 5. Gram. in Constit. Reg. in tit. de restit. minor n. 7, reports two cases there decided and he is cited with others, and followed by Sforz. Odd. de restit. in integrum, part 2, quaest. 80, n. 101. Vulpell cons., 101 throughout, and especially in n. 13 and 14, gives his opinion in the case of two parricides and boldly testifies that this view was thus followed at Rome, where he himself had often decided it (but would that he had been a judge at Rome or that he had been even able to testify concerning this practice!) and this statement of Vulpellus is cited by Flam. Cartar. de exeq. sent. c. fi. n. 235. See Joseph. Lud. decis. Lucens. 17, n. 55 in connection with n. 72 et seq., where he states that a boy less than fourteen years of age had been hung, who in company with highway robbers held the reins of a certain Venetian notary's horse while they stripped him in the public road; Brunor. a Sole in his Compendium Juris versi. minor capax mali, fol. 135, column 4 in princ., where he cites the Gloss. in d. 1. fere. And I remember also in the time of Gregory XIII a certain youth was hung by the feet in the castle of St. Angelo, who was privy to and participated in an escape which one Caesar had prepared to make from that castle (although he was surprised and captured in the very act of the escape) who himself was then beheaded.

NOTE BY THE AUTHOR. Any minute examination of the facts of the Cenci case would of course be irrelevant to the subject of this book, yet it may not be inappropriate to refer to them so far as concerns the

accusation made against Farinacius that he had fabricated the charge of attempted incest. Thus F. Marion Crawford in an article in the Century Magazine for January, 1908, p. 449, has examined the case in the new light thrown upon it by A. Bertoletti in his "Francesco Cenci e la sua famiglia," with the documents in the case preserved at Rome. Farinacius, he says, did not attempt to prove Beatrice's innocence, but labored to excuse her guilt, striving to make it seem pardonable, which is of course true, but Mr. Crawford asserts that Beatrice deposed that her father frequently beat her with a whip called the nerbo, and adds "yet Beatrice after torture, refused to admit that she had been thus maltreated by her father in order to make her yield to his unnatural desires. Prospero Farinacci, her chief advocate, did his best to defend her on that ground, but in the final edition of his works he was obliged to confess that the plea though put in for the defense, was never proved (Fuit articulatum sed non probatum). It might have been enough if Beatrice herself had asserted such a thing, even without giving any positive proof; she would probably have been acquitted on her mere word, and almost everything that has been written about the trial is based on the supposed truth of Farinacci's statement, which Beatrice with death before her refused to bear out. After him Planca Coronato Coronati, the advocate of the people, (sic) made the utmost of the same argument, and went to the length of asserting in his speech, that it was proved 'as he had presupposed,' in spite of Beatrice's refusal to admit the fact." And so Mr. Ernest Sutherland Bates in his study of Shelley's Drama of The Cenci (Columbia University Press, 1908) says that Farinacius advanced the charge of incest against the dead Cenci, but without other proof than that Beatrice had been kept a prisoner by him.

Mr. Crawford refers to the "final edition" of Farinacius's works. They were republished several times, and I do not know what edition he used. The edition of the Consilia before me is the Lyons ed. of 1619 published after the death of Farinacius which occurred in 1613, or as late as 1618. This is designated as editio postrema, and has the additions of Famianus Centolinus, and although the consilia were reprinted after that time, it is hardly likely that any later edition should contain any further comment by Farinacius himself. Mr. Crawford's citation, "fuit articulatum sed non probatum," is apparently intended as a quotation or paraphrase of Farinacius's remark, "prout et idem firmiter sperabatur de sorore Beatrice si propositam excusationem probasset, prout non probavit." Both expressions, however, mean the same thing, that Beatrice did not prove the plea or defense that was alleged in her behalf. To argue from this that Farinacius invented this defense is unfair, and is equivalent to saying that when a lawyer fails to prove his case he must have fabricated it. Every lawyer who has ever practiced has repeatedly enjoyed the experience of having a client tell him something before the trial, and utterly fail to testify to the same story in court.

Beatrice indeed, when subjected to torture, confessed "vix elevata," that is, as soon as she was hoisted up, to be dropped to the end of the

rope, according to the method of torture as described in Chapter IV, but would not, at any rate did not, charge her father with the alleged crime. This might have been because it was not true, or as some believe, out of a sense of shame, and perhaps the treatment of Beatrice by her father, the beatings and imprisonment to which she was subjected, may have been due to his anger against her occasioned by her intrigue with Olympio, one of the assassins.

What the real facts were we do not know and probably shall never fully ascertain. The charge against Francesco Cenci was not glaringly impossible in itself, and it seems generally conceded that Beatrice was beaten and imprisoned by her father without any legitimate reason. Of course Farinacius may have invented this allegation, but all that is here maintained is, that there is not sufficient in the record, as we have it, to prove that the charge against Father Cenci was not advanced in good faith. It will not be overlooked that this Consilium 66 of Farinacius was not strictly an argument to the trial court, but an appeal for clemency to the Pope, who was urged to consider whatever grounds for mercy existed in the case even if they were not technically proved. Mr. Bates in his essay above referred to says that Farinacius succeeded in saving Bernardo's life by the false plea that he was of weak intellect. It clearly appears that Farinacius urged in behalf of this youth, as grounds for the mitigation of his sentence, first, his minority; second, that he was not a principal author of the murder, but merely a consenting party to the previous arrangement between Beatrice and Olympio; third, the fatuity and imbecility of the youth, rendering probable his susceptibility to the influence of his brother Giacomo; and fourth, that Giacomo in his confession exculpated Bernardo. Famianus Centolinus in his note on the case says that Bernardo escaped death from a consideration of the case as a whole, but Farinacius himself, qu. 92, n. 108, refers to the case and states that the punishment of Bernardo was mitigated on account of his youth, he being only sixteen years old. He adds that the execution took place September 11, 1599, in a public square; Giacomo was killed with a mallet and his body cut into small pieces. Beatrice and Lucretia were beheaded, a horrible and pitiable spectacle for the people. Bernardo's sentence to the galleys in perpetuo (which was remitted to the Governor for further consideration) included the confiscation of his property, and the extent of the latter part of the sentence was considered by the Rota in Decisiones Recentiores, Part 1, dec. 622.

[Dynus in his Decisiones, published in 1713, mentions the case of Beatrice. Dec. 53, n. 8 and 19.]

APPENDIX No. 2

CERTAIN TEXTS OF THE CORPUS JURIS CITED IN THE OLD YELLOW BOOK

The Lex Julia de Adulteriis was, according to the Gloss, first introduced by Julius Caesar, and hence called by his name, but in its amended form it was promulgated by Augustus, B. C. 17 or 18; the Lex Cornelia de Sicariis was promulgated by Cornelius Sylla, B. C. 80 or 81; and the Lex Pompeia de Parricidiis by Cn. Pompeius about B. C. 55. The titles of the Corpus Juris relative to these laws are: Lex Julia: Digest, Book 48, Tit. 5, ad legem Juliam de Adulteriis coercendis; Codex, Book 9, Tit. 9, ad legem Juliam de Adulteriis et de Stupro; and Institutes, 4, 18, 4. Lex Cornelia: Digest, Book 48, Tit. 8, ad legem Corneliam de Sicariis et Veneficis; Codex, Book 9, Tit. 16, ad legem Corneliam de Sicariis; and Institutes, 4, 18, 5. Lex Pompeia: Digest, Book 48, Tit. 9, de lege Pompeia de Parricidiis; and Institutes, 4, 18, 6.

These are the laws so contemptuously alluded to by Browning:

> "Cornelia de Sicariis hurried to help
> Pompeia de Parricidiis, Julia de
> Something or other jostled Lex this-and-that."
> The Ring and the Book, I, 226.

These statutes were named after their authors or principal movers. Mr. Atlay, in his Victorian Chancellors, Vol. 2, p. 318, says that this practice is of modern date, but he must be understood as speaking of England, where we now have frequent instances, as Fox's Libel Act, Lord Campbell's Acts, the Lock Kinge Acts, etc. In the United States there are the Sherman Act, the Mann Act, etc., and in Pennsylvania among others, the Price Act, the Bullitt Act (or as it is generally termed, the Bullitt Bill), etc.

The actual texts of these laws have not been preserved, although some scholars have attempted to reproduce them from quotations scattered here and there in the writings of the commentators. The following description of them, however, is here sufficient, taken from Moyle's translation of the

last title of the Institutes with some condensation: "The Lex Julia, passed for the repression of adultery, punishes with death defilers of the marriage bed, and inflicts penalties on any who, without using violence, seduce virgins or widows of respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation. The Lex Cornelia or assassination pursues those persons, who commit this crime, with the sword of vengeance, and also all who carry weapons for the purpose of homicide. *Sicarius* or assassin is derived from *Sica* a long steel knife. This statute also inflicts punishment of death on poisoners, who kill men by their hateful acts of poison and magic, or who publicly sell deadly drugs. A novel penalty has been devised for a most odious crime by another statute, called the Lex Pompeia on parricide, which provides that any person who by secret machination or open act, shall hasten the death of his parent, or child, or other relative whose murder amounts in law to parricide, or who shall be an instigator or accomplice of such crime, although a stranger, shall suffer the penalty of parricide. This is not execution by the sword or by fire, or any ordinary form of punishment, but the criminal is sewn up in a sack with a dog, a cock, a viper, and an ape, and in this dismal prison is thrown into the sea or a river, according to the nature of the locality, in order that even before death he may begin to be deprived of the enjoyment of the elements, the air being denied him while alive, and interment in the earth when dead. Those who kill persons related to them by kinship or affinity, but whose murder is not parricide, will suffer the penalties of the Lex Cornelia on assassination." (See note on this ancient form of punishment of parricides below.)

l. si quis in gravi ff. de Senatus consulto Silaniano et Claudiano, Dig. 29, 5, 3.

Ulpianus in libro quinquagesimo ad edictum.

Rubric: Ad impossibile nemo obligatur.

Si quis in gravi valetudine adfectus, opem domino ferre non potuerit, subveniendum est ei.

Rubric: Assertio interfecti non probat, nisi probetur aliter mors illata. Bart.

1. Si quis moriens dixisset, a servo vim mortis allatum esse sibi: dicendum est, non esse credendum domino, si moriens hoc dixit, nisi potuerit et probari.

2. Si maritus uxorem noctu intra cubiculum secum cubantem necaverit, vel uxor maritum: servi poena Senatus consulti liberabuntur. Sed si exaudissent et opem non tulissent, plectendi erunt, non tantum si proprii essent mulieris, sed etiam si mariti.

3. Si tamen maritus in adulterio deprehensam occidat, quia ignoscitur ei: dicendum est, non tantum mariti, sed etiam uxoris, servos liberandos, si justum dolorem exsequenti domino non restiterunt.

Gloss on word "ignoscitur:" "quantum ad poenam legis Corneliae de sica, sed non in totum."

Translation: Ulpian on the Edict, book 50.

[On the obligation of slaves to render aid to their masters.] If any one [a slave], afflicted with a serious illness, shall not have been able to bring aid to his master, he should be relieved [of his obligation to do so].

Rubric: The declaration of one who is killed proves nothing, unless in some other way it be proved how his death was inflicted. Bartolus.

1. If any one on his death bed shall have said that death was inflicted on him by a slave, we should say that the master ought not to be believed, although he said this on his death bed, unless the fact can also be proved.

2. If a husband shall have killed his wife at night, while lying in bed with him in their bedroom, or the wife have killed her husband; the slaves shall be freed from the penalty of the Senatus consultum. But if they heard it, and did not give their aid [to the one who needed it], they shall be punished, not only if they belonged to the wife, but also if they were the husband's, [i.e., whether they belonged to the assassin or the victim].

3. If however the husband kills his wife when detected in adultery, because excuse is made for him, we should say that not only the husband's slaves, but the wife's also, should be freed [from the law], if they do not resist their master, who was fulfilling his just resentment.

Gloss on the words "excuse is made for him:" "So far as concerns the penalty of the Lex Cornelia de Sicariis, but not altogether."

1. ex lege Julia ff. ad legem Juliam de adulteriis, Dig. 48, 5, 2, 2.

Ulpianus libro octavo Disputationum.

2. Lenocinii quidem crimen lege Julia de adulteriis praescriptum est: cum sit in eum maritum poena statuta qui

de adulterio uxoris quid acceperit: item in eum qui adulterio deprehensam retinuerit.

Translation: Ulpian Book 8 of Disputations.

The crime of pandering moreover is included in the prohibition of the Lex Julia de adulteriis, since its penalty is imposed on a husband who has received anything for his wife's adultery; also on him who has retained her who was detected in adultery.

l. quod ait lex ff. ad legem Juliam de adulteriis, Dig. 48, 5, 24 (23).

Ulpianus libro primo de adulteriis.

Quod ait lex, "in filia adulterum deprehenderit:" non otiosum videtur. Voluit enim ita demum hanc potestatem patri competere, si in ipsa turpitudine filiam de adulterio deprehendat. Labeo quoque ita probat: et Pomponius scripsit, in ipsis rebus Veneris deprehensum occidi. Et hoc est quod Solo et Draco dicunt ἐν ἔργῳ

Gloss on words "in ipsis rebus:" Sunt enim res Veneris, antecedentia ipsum scelus: scilicet apparatus, colloquia, locus constitutus, convivia, basia, tactus. Nam ab ipsis argumentum sceleris inducitur: ut in Topicis Marci Tulii, unde versis:

Visus et alloquium, tactus, post oscula factum.

Translation: Ulpian in his first book Of Adulteries.

That the law says "[the father] shall have detected the adulterer with his daughter," does not appear to be superfluous. For it intends that the father shall thus possess the right only if he detects his daughter in the very act of adultery. Labeo also approves this, and Pomponius wrote that the adulterer should be killed if detected in the act. And this is what Solon and Draco say, ἐν ἔργῳ

l. quod ait lex ff. ad legem Juliam de adulteriis, Dig. 48, 5, 24 (23), 4.

Quod ait lex, "incontinenti filiam occidat:" sic erit accipiendum, ne occiso hodie adultero, reservet, et post dies filiam occidat: vel contra: debet enim prope uno ictu et uno impetu utrumque occidere, aequali ira adversus utrumque sumpta. Quod si non affectavit, sed dum adulterum occidit, profugit filia, et interpositis horis apprehensa est a patre qui persequebatur, incontinenti videbitur occidisse.

Accursius adds the glosses, after persequebatur, "Subaudi, et tunc pater occidit;" and after occidisse, "et sic non tenebitur pater."

Translation: That the law says "he may kill his daughter forthwith (incontinenti)," should be thus understood, that he should

not, after having killed the adulterer today, wait, and after some days kill his daughter, or vice versa; for he ought to kill both as nearly as possible, with one blow, and one attack, with his anger equally excited against both. But if he did not attempt to do this, but while he killed the adulterer, his daughter escaped, and after some hours' interval she is caught by the father who pursued her [and then killed her], he will be considered to have killed her forthwith [and so shall not be liable].

(Bréard-Neuville, in Pothier, translates incontinenti, "sur-le-champ.")

l. nec in ea ff. ad legem Juliam de adulteriis, Dig. 48, 5 (23), 22, 4.

Papinianus; libro primo de adulteriis.

4. Ideo autem patri, non marito, mulierem et omnem adulterum remissum est occidere, quod plerumque pietas paterni nominis consilium pro liberis capit: caeterum mariti calor et impetus facile decernentis fuit refraenandus. [The latter part is misquoted by Bottini in § Neque obstat, CXCVI, 200, Ch. VIII, sec. 78: quia pietas paterni *amoris* plerumque consilium pro liberis capit, mariti vero calor et impetus facile *saevientis* fuit refrenandus.] The sense is the same.

Translation: Papinianus in Book 1 Of Adulteries 4. Therefore, moreover, a father but not a husband is permitted to kill the woman and every adulterer, because generally parental duty takes good counsel for his children, but the passionate violence and impulse of a husband coming readily to a conclusion, should be curbed.

Gloss on the word "omnem," every adulterer; "but a husband is thus permitted only to kill a base adulterer, as in l. marito. But certainly it seems that a husband may kill his wife, as above in ad Sil. l. si quis in gravi § si maritus," etc.

l. marito ff. ad legem Juliam de adulteriis, Dig. 48, 5, 25 (24).

Macer libro primo publicorum [judiciorum].

Marito quoque adulterum uxoris suae occidere permittitur: sed non quemlibet, ut patri: Nam hac lege cavetur, ut liceat viro deprehensum domi suae, non etiam soceri, in adulterio uxoris occidere eum, qui leno fuerit: quive autem ludicram ante fecerit: in scenam saltandi cantandive causa prodierit: judiciove publico damnatus, neque in integrum restitutus erit: quive libertus eius mariti uxorisve, patris, matris, filii, filiae utrius eorum fuerit: nec interest, proprius cuius eorum, an cum alio communis fuerit, quive servus erit.

1. Et praecipitur ut is maritus qui horum quem occiderit, uxorem sine mora dimittat.

Translation: Macer, Book 1, of Public actions.

The husband also is permitted to kill the adulterer of his wife, but not everyone without distinction, as the father may [in case of his daughter]. For by this law it is provided that a husband may kill his wife's adulterer when detected in the husband's own house (but not even in that of his father-in-law), the adulterer being a pander, or who follows the employment of an actor; appears on the stage to dance or sing; or has been convicted of some public offense, and has not been restored to his civil rights; or who is the freedman of the husband or the wife or of the father, mother, son or daughter of either of them (nor does it make any difference whether he had been the individual property of any of them or owned by another in common) or their slave.

1. And it is directed that the husband who shall kill any of these should send away his wife without delay.

l. mariti ff. ad legem Juliam de adulteriis, Dig. 48, 5, 30 (29).

Ulpianus libro quarto de adulteriis.

Mariti lenocinium lex coercuit, qui deprehensam uxorem in adulterio retinuit, adulterumque dimisit. Debuit enim uxori quoque irasci, quae matrimonium eius violavit. Tunc autem puniendus est maritus, cum excusare ignorantiam suam non potest, vel adumbrare patientiam praetextu incredibilitatis. Idcirco enim lex ita locuta est "Adulterum in domo deprehensum dimiserit;" quod voluerit in ipsa turpitudine deprehendentem maritum coërcere.

The Gloss puts a case: Vir uxorem inventam cum scholari in lecto, finxit se non videre, et scholarem recedere dimisit; et uxorem retinuit. Dicitur quod hic punitur de lenocinio.

Translation: Ulpian, in Book 4 on Adulteries.

The law has punished pandering by a husband, who has retained his wife detected in adultery, and allowed the adulterer to go away. For he should have been enraged at his wife also, who has violated her marital duty. Then moreover a husband should be punished when he cannot excuse his ignorance, or veil his patience with the pretext of incredulity. For it is for this reason that the law has thus said "shall have allowed the adulterer detected in his house to go away;" because the intention of the law is to punish the husband who detects [the adulterer] in the act of adultery [and allows him to go].

l. si adulterium cum incesto ff. ad legem Juliam de adulteriis, § 38, Imperatores, Dig. 48, 5, 39 (38), 8.

Papinianus libro trigesimo sexto Quaestionum.

Rubric: Qui uxorem deprehensam in adulterio occiderit, non tenetur leg. Corn. de sica. tamen aliter et aliter secundum conditionem personae punitur.

8. Imperator Marcus Antoninus et Commodus filius rescripserunt: Si maritus uxorem in adulterio deprehensam, impetu tactus doloris interfecerit: non utique legis Corneliae de Sicariis poenam excipiet. Nam et Divus Pius in haec verba rescripsit Apollonio: "Ei, qui uxorem suam in adulterio deprehensam occidisse se non negat, ultimum supplicium remitti potest, cum sit difficillimum justum dolorem temperare: et [magis] quia plus fecerit quam quia vindicare se non debuerit, puniendus sit. Sufficiet igitur, si humilis loci sit, in opus perpetuum eum tradi: si qui honestior, in insulam relegari.

(Magis, not in Florentine MS. and omitted in Textus receptus.)

Translation: Papinian in Book 36 of his Quaestiones.

Rubric: He who kills his wife detected in adultery is not bound by the Lex Cornelia de Sicariis, but yet is punished in one way or another according to the social standing of the person.

The Emperor Marcus [Aurelius] Antoninus and his son Commodus issued this rescript: If a husband seized by the impulse of resentment has killed his wife detected in adultery, he shall surely not be bound by the penalty of the Lex Cornelia de Sicariis; for the Deified Pius issued his rescript to Apollonius in these words: "The death penalty may be remitted to him who does not deny that he killed his wife detected in adultery, since it is most difficult to restrain just resentment; and he should be punished [rather] because he exceeded his rights than because he should not have avenged himself. It is therefore sufficient, if he is of humble station, to sentence him to labor for life, but if he is of higher birth, to relegation to an island."

(Marcus Aurelius admitted his youthful son Commodus to full participation of the Imperial power. Bartolus in his commentary says: Tene menti hunc casum; quia bonus casus est.)

l. prima § fin. ff. ad legem Corneliam de Sicariis, Dig. 48, 8, 1, 5.

Marcianus libro quarto decimo Institutionum.

5. Sed et in eum qui uxorem deprehensam in adulterio occiderit, Divus Pius leviorem poenam irrogandum esse scripsit: et humiliore loco positum, in exilium perpetuum dari jussit; in aliqua dignitate positum, ad tempus relegari.

Translation: Marcian in the 14th book of his Institutes.

But the Deified Pius issued his rescript that a lighter penalty should be inflicted on him who killed his wife detected in adultery; and if he were in a humble station, he should be ordered to be sent into perpetual exile; if placed in any higher rank, to be relegated for a time.

l. Divus Hadrianus ff. de lege Pompeia de parricidiis, Dig. 48, 9, 5.

Marcianus libro quarto decimo Institutionum.

Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterbat, in insulam eum deportasse: quod latronis magis quam patris jure eum interfecit. Nam patria potestas in pietate debet, non atrocitate consistere.

Gloss. Figuratio casus: Qui filium occidit, quem cum noverca jacere credebat, et erat forte verum, deportatur in insulam.

Translation: Marcian, Book 14 of his Institutes.

The Deified Hadrianus is reported, when a certain man had killed his son while hunting, who had committed adultery with his mother-in-law, to have deported the father to an island, because he killed his son rather in the manner of a brigand than by his paternal right, for the paternal power should depend upon the paternal duty rather than severity.

Gloss: Statement of the Case: One who killed his son, whom he believed to have committed adultery with his stepmother — and perhaps it was true — it deported to an island.

(Mr. Hearn in The Aryan Household, p. 100, refers this case to the old law of patria potestas, under which the house father, in the exercise of his authority, was expected to act in a judicial capacity. See Strachan-Davidson, Problems of the Roman Criminal Law, vol. 2, 28-34, who styles this an obscure case.)

l. poena ff. de lege Pompeia de Parricidiis, Dig. 48, 9, 9.

Modestinus libro duodecimo pandectarum.

9. Poena parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verberatus, deinde culleo insuatur cum cane, gallo gallinaceo, et vipera, et simia; deinde in mare profundum culleus iactatur, hoc ita, si mare proximum sit; alioquin bestiis obiicitur, secundum D. Hadriani constitutionem.

1. Qui alias personas occiderint praeter matrem et patrem et avum et aviam, quos more maiorum puniri

supra diximus, capitis poena plectentur; aut ultimo supplicio mactantur.

Translation: Modestinus in Book 12 of his Pandects.

9. The punishment of the crime of parricide is thus regulated according to the custom of our ancestors: the parricide was beaten with bloody rods, then sewed up in a leather sack, with a dog, a cock, a viper and an ape; then thrown into the depths of the sea, provided that the sea was close at hand, otherwise he was thrown to the wild beasts, according to the constitution of the Deified Hadrian.

1. Whosoever shall have killed other persons than mother, father, grandfather and grandmother (who we have above said are punished according to the custom of our ancestors) shall be punished by loss of civil rights or suffer the extreme penalty of death.

(The translation of the last sentence in Pothier is obscure: "seront punis de mort ou du dernier supplice."

According to the Gloss this ancient mode of punishment became obsolete before the Lex Cornelia and the Lex Pompeia. The bloody rods may mean rods colored to resemble blood, or rods made of a reddish wood or rods which became thus colored by the blood of the criminal. When the sea was too far away, the sack might be thrown into a river. For the death penalty there might be substituted a sentence to the mines, which was considered equal in severity. There is a curious gloss on "gallo gallinaceo."

This interesting subject is fully treated by Joannes de Solorzano, Disputatio de Parricidii Crimine, Salamanca, 1609, also included in 5 Thesaurus 981; and by Jo. Franciscus Ramos, Errores Triboniani de poena Parricidii, Leyden, 1728. Accounts of it may be found in Petrus a Plaza, Epitome Delictorum, vol. 1, ch. 22, and as to the Spanish law see Matthaeu et Sanz, De Re Criminali, cont. 8, n. 25; and see as to the viper, Sir Thomas Browne's Vulgar Errors, Book 3, ch. 16. Strachan-Davidson in Problems of the Roman Criminal Law, vol. 1, p. 23, discusses the subject from the modern point of view, and see as to the history of this punishment, J. B. Moyle, Inst. 4, 18, 16.)

l. non puto ff. de Jure Fisci, Dig. 49, 14, 10.

Modestinus libro singulari de praescriptionibus.

10. Non puto delinquere eum qui in dubiis quaestionibus contra fiscum facile responderit.

Translation: Modestinus in his one-volume book on Prescriptions.

10. I do not think that he errs, who in doubtful questions renders his opinion without hesitation against the Fisc.

1. crimen C. ad legem Juliam de adulteriis et stupro, Cod. 9, 9, 2. Impp. Severus et Antoninus, A. A. Cyro.

2. Crimen lenocinii contrahunt, qui deprehensam in adulterio uxorem in matrimonio retinuerunt, non qui suspectam adulteram habuerunt. PP. Kalend. Julii, Anullino et Frontone Coss. [a. 199].

Translation: The Emperors Severus and Antoninus Augusti to Cyrus.

2. The crime of pandering is committed by those who have retained in marriage a wife detected in adultery, not by those who have [keep] a suspected wife.

PP. Kalends of July, Consulate of Anullinus and Fronto [A.D. 199].

The rubric from Baldus is, He who knows it, is punished, but not he who suspects it.

Cujacius in his Observationes on this Title says: In adultery there is a man and a married woman (aliena). In stuprum both the man and the woman are unmarried or the man is married and the woman in unmarried (vacua).

(Antoninus was the real name of Caracalla, the eldest son of Severus.)

1. Gracchus, C. ad legem Juliam de adulteriis, Codex 9, 9, 4.

4. Imp. Alexander A. Juliano proconsul. Narbonens. provinciae.

Gracchus, quem Numerius in adulterio noctu deprehensum interfecit, si eius conditionis fuit, ut per legem Juliam impune occidi potuerit; quod legitime factum est, nullam poenam meretur. Idemque filiis eius qui patri paruerunt, praestandum est. Sed si legis auctoritate cessante, inconsulto dolore adulterum interemit, quamvis homicidium perpetratum sit; tamen quia et nox et dolor iustus factum eius relevat, potest in exilium dari.

PP. sine die et consule.

Translation: If the condition in life of Gracchus, whom Numerius killed when detected at night in adultery, was such that he could be killed with impunity by the Lex Julia, [Numerius] deserves no punishment, because the deed was lawfully committed; and the same immunity should be afforded to his sons, who were present at their father's command. But if he killed the adulterer in circumstances where the authority of that law does not apply, and in his inconsiderate resentment, although he has committed homicide, nevertheless because both the night

time and his just resentment mitigate the deed, he may be sent into exile.

PP. without date or names of consuls.

(The Emperor Alexander Severus reigned A.D. 222-235.

The syntax of this law is somewhat faulty, but the meaning is clear. The statement of the case or Figuratio Casus as given in the Gloss is: "Numerius detects Gracchus in the act of adultery with the wife of Numerius, and kills him — the question is whether he should sustain any punishment by reason thereof? And the distinction is made, whether the adulterer were such as the husband may lawfully kill and not be punished; or if this is not the case [the husband] may be exiled."

The Gloss of Salycetus is: "A husband may without incurring punishment kill with his own hand, or by his sons, a lowborn adulterer detected in adultery in the night time, but if he kills one who is not lowborn, he is not freed altogether, but is punished more mildly."

Pothier adds on this law: "hence it is correctly inferred that a husband may kill, by the aid of his servants, those whom he has a right to kill with his own hand."

This is the so-called "Gracchian law, Code concerning adulteries," of which the Browning critics speak. The Misses Porter and Clark in their note to The Ring and the Book, VIII, 566, attribute it to "Caius Sempronius Gracchus, the Roman Tribune, who made many laws.")

It would be interesting, if it were possible, to trace the development of the law from the above citations, but this is not possible as the dates of the decisions and opinions of the jurisconsults cannot be accurately determined. An opinion of Ulpian for example may be based upon a much earlier decision, or Imperial rescript, and merely embodied in his treatise. Roughly speaking the law took its shape in the latter half of the second and first half of the third centuries and was thus crystallized in Justinian's compilation. It may be useful, however, to recapitulate first, the father's right in the case of a daughter, as stated by Ulpian circ. A.D. 217. In l. quod ait lex Dig. 48, 5, 24 (23), Pr. Ulpian insists upon the necessity of detection by the father in flagrante and in the same law, § 4, he lays stress on the necessity of immediate action by the father; he should kill both his daughter and her paramour if possible with one blow, though if he kills the latter and the daughter escapes, and he pursues her at once and kills her after a few hours, he will be considered as having killed her immediately. The father's right in the case of a son under the decision of the

Emperor Hadrian as reported by Marcian in l. Divus Hadrianus, Dig. 48, 9, 5 (lex Pompeia), dates from A.D. 117 to 138. There the son had committed adultery with his stepmother, and the father killed the son subsequently while hunting with him. Hadrian deported the father to an island, holding him guilty of having exceeded his paternal power in that he acted as an assassin or brigand rather than a father. How far this decision in its mitigation of the punishment, depended on the old law of the patria potestas is difficult to say, but at all events it remained as a leading case, and is much relied on in the O. Y. B. Somewhat later Papinian (died A.D. 212) in l. nec in ea, Dig. 48, 5 (23), 22, 4, held that the power of a father to kill his daughter and her paramour of whatever condition is not extended to a husband in the case of his wife, the reason given by Papinian being that as a rule parental duty or affection will take care that the parental power be not abused, while the angry passion of a husband should be restrained. Ulpian about 217 held in l. lenocinii quidem, Dig. 48, 5, 2, 2 (lex Julia) that a husband who retains his wife detected in adultery, was guilty of the crime of pandering, and in l. mariti, Dig. 48, 5, 30 (29), the law was said by Ulpian to be aimed at the punishment of a husband who lets the adulterer go when detected; and this was apparently based on an earlier decision of the Emperor Septimius Severus and his son Caracalla, A.D. 199, Cod. 9, 9, 2, with the qualification that it did not apply to the retention of a wife who was merely suspected. Somewhat earlier, about 161 to 180. in 1. Si adulterium cum incesto, § Imperator Marcus Antoninus, Dig. 48, 5, 39 (38), 8, generally cited as l. Imperatores, it was held according to a rescript of Marcus Aurelius that a husband who kills his wife detected in adultery is not bound by the lex Cornelia, following a rescript of Antoninus Pius, which decided in such a case that the homicide should be sentenced, if of humble station, to labor for life, but if of higher birth to relegation. This often cited rescript was embodied by Papinian in his Quaestiones, also by Marcian in his Institutes, and was also extracted by the compilers of the Digest, 48, 8, 1, 5. Somewhat later, about A.D. 212, it was said in l. si quis in gravi 3, Dig. 29, 5, 3, 3, what when a wife is detected in adultery and killed by her husband, their slaves are released from their obligation to give her their assistance, because the husband in such a

case is relieved from the extreme penalty of the lex Cornelia, but in l. marito quoque, Dig. 48, 5, 25 (24) Pr. about the same date, a husband was given the right to kill his wife's paramour only under certain conditions: first the paramour must be detected in the husband's own house and not even in that of the wife's father; second, the paramour must be vilis, i.e., of low condition, an actor or convicted of some public offense, a freedman of the wife or certain others. However, by l. Gracchus, Cod. 9, 9, 4. the Emperor Alexander, who reigned A.D. 222 to 235, in what was consequently a later rescript, held that provided the paramour was vilis, the injured husband was immune from punishment under the lex Julia, as were also his sons who assisted him, and further that even if the requirements of the lex Julia were not complied with, yet the offense having been committed at night, this fact and the husband's natural anger operated to relieve him from death, for which exile was substituted.

All of these texts had some more or less direct bearing on the legal problems presented in the O. Y. B., but it is easy to see that the questions, especially in connection with the elaborate distinctions made in the enormous number of later decisions, and discussions of the commentators, were by no means easy of solution.

APPENDIX No. 3

PREFATORY NOTE. In this Appendix will be found translations in abstract of the three controversiae, Nos. 11, 12, and 13, of Laurentius Matthaeu et Sanz, that are most frequently cited in the O. Y. B. No. 12 is especially important, being the case of Francesco Palomeque, who killed his wife Maria de Odosa. This decision was greatly relied upon by Archangeli and Spreti in their defense of Guido.

Matthaeu et Sanz was a distinguished Doctor of Valentia, member of the Royal Council, Fisc of the Royal Court, Prefect and Senator, and President of the Supreme Criminal Court, having had twenty-four years' experience as a Criminal Judge. Professor Hodell and other editors of Browning confuse him with his contemporary, the Dutch jurist, Antonius Matthaeus II. Matthaeu et Sanz was one of the best law writers of his times; his Latin is better than the average, and his style is clear and fluent. Unfortunately from considerations of space, I cannot give the translation of these interesting cases in full, but am forced to condense them. The Tractatus de Re Criminali was published in 1676, not many years before the period of the O. Y. B.

MATTHAEU ET SANZ, CONT. 11.

N. 1. Facti species proponitur.

"Joannes Vecino, of the village of Dagançco was accused of homicide, sacrilege, treason, and parricide committed in a single act. For being suspicious, not without reason, that his wife Anna Maria was guilty of adultery in carrying on a disgraceful intimacy with a clerk in holy orders, Joannes had feigned absence, under the pretext of going to see a bullfight that was being held in one of the neighboring towns on August 13, 1662. At eleven o'clock of the same night he returned home with Emanuel Fernandez, his uterine brother, and entered the house by going through the garden shrubbery. The noise was heard of the explosion of firearms with shouting and struggling. The door was found closed, and after it had been opened by the authority of the Judge Ordinary,[1] there were found in the interior apartments of the house, namely, in the inner courtyard next to the garden, the clerk in unclerical clothing and riddled

[1] i.e. Deputy or Vicarius of the Praetor, "Teniente del Corregidor. See Cont. 14, n. 1.

with arquebuse shots, and the wife mortally wounded with nineteen dagger wounds. Her shoes were scattered on the ground, the discharged arquebuse lay beside the dead body of the clerk, and the maidservant, who was alone in a more distant bedroom of the house, had either fled at daybreak or been hidden. Exactly what had happened could not be gathered with certainty. According to the wife's account, the story was that the clerk had been sent for by her to ask her husband to send her back to the home of her family, and while she was talking with him she had been discovered by her husband. The clerk was killed by Emanuel, and she herself mortally wounded by her husband. She likewise confessed the grounds of her husband's suspicions, namely, her repeated conversations (confabulationem) with the clerk, and his detection in her bedroom. But the husband, who after some months appeared of his own accord, in his confession related at large the reasons for his belief of her adultery, many of which were proved in the proceedings; his detection of the clerk and his wife in the very act, and his attempt to kill the clerk; that he, however, had been overcome and almost strangled by the clerk, who had wounded the brother with an arquebuse shot; but that finally he had killed the clerk and had wounded his wife with the intention of killing her."

N. 2. "From this discordant testimony, there resulted only the certainty that the clerk was detected solus cum sola, in a dark and secret place at night time, behind closed doors, in the absence of witnesses; the clerk being dressed in unseemly and unusual clothing and the wife being in her bare feet with her shoes scattered on the ground; to which things were added weighty indications in proof of adultery together with the general bad reputation of both. In this state of the case the question of law was debated as doubtful, whether the husband should be punished for sacrilege, as having killed the clerk with intention aforethought and insidiously, and as a parricide of his wife, or whether indeed he should be acquitted as though he avenged the adultery, acting as the minister of the law?"

The discussion that follows is interesting but too lengthy to transcribe in full. There should be added, however, to the foregoing facts what appears in the argument, that the clerk and the husband were connected by marriage although in a remote degree, which it was argued accounted for the intimacy and familiarity shown by the clerk; and further, that the husband and the clerk were adversely interested in certain litigation pending in reference to an accounting in court of the estate of a minor with whom apparently they were connected. These things, and a dispute that arose in reference to the marriage of a relative,

were claimed to afford reasons for the husband's hostility to the cleric. As to this Matthaeu says:

N. 37. "Nor did any other cause appear for the perpetration of this crime except the adultery. For the enmity that was said to have arisen between the husband and the deceased arising from the accounting of the estate of Gregorius Zarçuela, or from the marriage of Maria Vecino, might have resulted in the murder of the clerk, but not in the wounding of the wife, who could not have been connected with enmity of that nature. For when the
N. 38. cause of a crime ceases, there ceases every presumption of its commission, Farinac. qu. 50, n. 3, qu. 52, n. 150. For the cause always corresponds with the effect, since no one is presumed to do wrong for a light cause, Giurba, cons. 46, n. 28, and so it is not to be presumed that the clerk was killed for these lighter causes, nor can it be presumed from them that the wife was mortally wounded by so many dagger wounds, since none of the said causes related to her; and so a weighty cause must be sought that related to both of them; this could have been nothing else than their adultery; therefore we must conclude that the
N. 39. crimes had been perpetrated on this account. And if we grant that all these causes concurred, no one will deny that the adultery was a more serious cause than the others; but when causes concur the more serious is to be considered as following from the more serious injury, as Farinacius shows, qu. 49, n. 116, therefore it is manifest that the murder of the clerk and the wounding of the wife had been perpetrated on account of the adultery."

The conclusion of the court on all the points of law was in favor of the defendant, though he was not discharged without punishment. The decision was as follows:

N. 46. "But the matter having been more maturely considered in the Aula, it was adjudged that the husband had conducted himself too treacherously in feigning absence, in taking his brother with him, and in killing with prohibited arms, because a crime is rendered insidious with us merely by the use of firearms (ex usu armorum igneorum) according to the Text in l. 15, tit. 23, lib. 8, recopil. as Azevedo teaches. And so it was decided, on account of this excess, that the defendant should be sentenced to the punishment of exile for four years, and to pay two thousand ducats. Sentence, February 29, 1664, which was affirmed on appeal (in gradu supplicationis) on April 3, of the same year. Actuary, Dominico Lopez de la Serra."

CONTROVERSIA 12.

1. Facti species proponitur.

"While Francesco Palomque was absent, his wife Maria de Odosa, who was already under suspicion of adultery, plundered

her husband's home of his portable property, and ran away with her adulterer. At length she appeared before the Ecclesiastical Judge Ordinary by her surety, having been delivered under bail to a friend, who was reported to be the adulterer himself.[1] The husband made his way into the latter's house on August 13, 1667, and killed his wife with a pistol shot,[2] he took flight with some friends who were his companions, and had been summoned for the purpose; but after the expiration of a very few days, he was arrested by my order, and the question was discussed with what penalty he should be punished?"

2. "By the prosecution it was said that the whole reason for mitigating the punishment in the case of a husband who kills his wife rests upon the just resentment (justo dolore) arising from her detection (ex apprehensione), in the very act of adultery, as is expressly proved by all the laws which are generally cited therefor by the authorities."

3. "For without making mention of the laws of Solon and Draco, of Plato and of Romulus and of the Twelve Tables, of which we spoke in the preceding controversia, No. 8, in which laws this caution is found, we have these words in the law si adulterium 38, § Imperatores ff. ad leg. Jul. de Adult.: '(Si maritus) If a husband, overcome by the impulse of his resentment shall kill his wife detected in adultery (in adulterio deprehensam);' in l. marito 24, ff. eodem: 'That a husband is permitted to kill his wife's adulterer when detected (deprehensum) in his own house but not in that of his father-in-law;' in l. 1, § fin. ff. ad leg. Cornel. de Sicar.: 'but also upon him who kills his wife detected in adultery (deprehensam in adulterio);' in l. si quis in gravi, 3, § si tamen maritus ff. ad Syllan; 'if however the husband kills his wife detected in adultery (in adulterio deprehensam), because excuse is made for him;' in l. Gracchus 4 C. ad leg. Jul. de Adulter: 'Gracchus whom Numerius killed when detected in adultery (Gracchus quem Numerius in adulterio deprehensum

N. 4. interfecit)' — which decisions are recognized by the texts not only in the case of a husband but also in that of a father, for although the laws concede to the latter more freely the power of killing an adulterous daughter, see text in l. patri 20 ff. eodem, yet they require the essential of detection (qualitatem apprehensionis), as Ulpianus expressly said in l. quod ait lex 23 in princ. ff. eodem: 'What the law says in the case of a daughter, that the adulterer shall be "detected," does not appear superfluous (otiosum) for the law intends that this power shall belong to the father only in the case that he detects his daughter in the very shame of her adultery, Labeo also approves this and Pomponius gave his opinion that the woman be killed when

[1] demum apparuit per Judicem ordinarium Ecclesiasticum per sequestrum tradita amico, ut dicebatur, etc. [2] instrumenti manualis ictu necavit; instrumentum manualis, a handweapon or pistol.

detected in the very act. From which texts the purpose of the law is said to be worked out (enixa) by which the "detection" in the very act is necessary for excuse, not only in the case of a father but also in that of a husband.'"

N. 5. "Wherefore there have been many Doctors who have taught that a husband who kills his wife under other conditions than that of detection, should be punished with the ordinary penalty" (citing authorities).

N. 7. "But as the contrary opinion is the more just and merciful, it is the more generally received — not only among the Doctors but also in the Supreme Courts (Senatus) of almost all Europe, and this opinion is verified by many laws. In proof of this I shall consider in the first place the text in l. si uxor 13, § 2, ff. ad leg.

N. 8. Jul. de Adulter. where Ulpianus says as follows: 'But the husband can avenge adultery upon the person of his wife who has become common (vulgaris).' In which text, although in the beginning the Jurisconsult is speaking of the right of accusation, in this section and in the following he speaks of vengeance; and Dionysus Gotofridus notes on this passage that by the word 'vulgaris' it should be understood 'who has made merchandise of her body.' But such vengeance does not hold good, nor can it hold good upon 'detection,' since 'to make merchandise of her body' is not accomplished by a single act, nor can a woman become 'common' by it; therefore just resentment arising, a husband can avenge his injury upon his wife, although she is not detected in the act."

N. 9. "In the second place, I consider the text in said l. divus Adrianus, 5, ff. ad leg. Pompei. de parricid. where Macer in the first place supposes adultery in the past tense, although in the imperfect, viz., 'who was committing adultery with his stepmother;' which according to the rules of the grammarians betokens a past act with its continuance, and this cannot be a 'detection' in flagranti, as Castrensis and Hippolytus de Marsiliis have held, who are quoted and rejected by Ant. Gomez in said l. 80, n. 59. How can we say that the son, who was killed while engaged in hunting because he 'was committing adultery,' was 'detected' in the act itself? for he was not 'detected,' as Bartolus has shown in l. divus in princip. and after him Caballus cas. 15, n. 6. Nevertheless the husband was punished but more mildly, that is, banished, as the Jurisconsult says; and, as may be gathered from his language, it was on account of the excess in the manner of killing, 'because he killed him rather in the manner of a brigand than by the right of a father;' to which Bartolus adds, 'he killed as a brigand not as a father;' and Pichardus follows him in § Alia deinde lex n. 5, instit. de publ. jud.; Caballus cas. 15, n. 9. Being therefore excited by just resentment he should be punished more mildly although he did not kill the offender detected in the act. And although in my opinion the Jurisconsult

does not deny to the paternal power (patria potestas) in the case stated, the right of punishment as against the son, according to the opinion of some, which is gathered from the words of the same Jurisconsult; 'for the patria potestas ought to rest in paternal affection, not in cruelty;' nevertheless from the same words the cruelty of the deed is demonstrated * * *"

N. 12. "In the third place, I consider the text in said law si adulterium cum incestu, § Imperatores ff. ad leg Jul. de Adulter.; 'since it is most difficult to restrain just resentment.' But this reason holds good not only in the case of 'detection', but also in that of certain information or knowledge of the adultery, since with upright and honorable men resentment is equally excited in either case; which resentment is indeed most difficult to restrain as the Jurisconsult says; for the reason of the mitigation of the punishment is this, that a man agitated by intense resentment is not in the fullness of his intellect; text in l. qui cum major , § libertus, ff. de bon. libertor. cap. olim de restit. spoliator, cap. significasti de poenit. et remiss., with other authorities collected by Ant. Gomez n. 58, vers. item homo; Farinac. cons. 141, n. 18; Cabal. cas. 154, n. 19. Therefore, whenever this reason occurs, we should hold that this rule applies; all laws speaking of just resentment and atrocious injury are to be interpreted in the same way when the same reason impels."

N. 15. "Nor should we desist from this opinion on the ground that the laws require 'detection' in the act itself, since he or she is said to be 'detected' who, by his or her confession or otherwise, is convicted of adultery, leg. 1, and Bartolus n. 4, C. de petit. sublat. lib. 10; [A reference to the commentary of Bartolus on Codex 10, 12, de petitionibus bonorum sublatis, relative to the right of the Fisc to a forfeiture of the goods of one 'quisquis in crimine majestatis deprehensus fuerit,' or detected in the crime of treason. Bartolus says: 'He is said to be detected in a crime who is convicted of it.'] Mascard. de probat. book 1, conclus. 64, n. 8 and 9; Bertazol. cons. 42, n. 10; Caball. cas. 300, n. 25. And so whenever a husband has evident knowledge of his wife's adultery, he may be said to 'detect' her."

N. 16. "These authorities indeed are not weakened by this, that, according to the addition of Angelus to Bartolus in said law, whenever the law or a statute punishes the 'detection,' such 'detection' is necessary; for the laws of which we speak do not require the 'detection' in order that punishment may be inflicted, but in order to provide an excuse; and so their purview is to be extended, because it is to be favored, and to be interpreted in the preferable meaning. And if we should grant, with reference to punishment of adultery, that it has been taken in hand by the husband, it is not 'detection' that is punished, because that is only a species of proof, and consequently in whatever way it

be proved, the husband shall be excused. In this way Bartolus is explained in said l. 1, 14, where [Alexander] makes a note upon a statute which says [Alex. Facit ad statutum dicens] that if the judge 'detects' that any one is committing theft let him be punished in a hundred [i.e., fined in a certain sum]; that if he finds him not in flagranti, but after the theft has been consummated, the statute shall be complied with, because the judge is said to 'detect' him by convicting him."

N. 17. "Nor is this to be distinguished from the case of a husband because it is said of a judge; for as I have said, the husband is the minister of the law, if we trace the matter from the beginning, according to the said 15th law of Romulus the power conceded to a husband of killing his adulterous wife seems to have been given to him, not in the right of a bandit, but in the manner of a judicial sentence, as Balduinus explains it in said l. 15, n. 9; 'Nor in truth did the husband and his relatives pronounce a judgment at home upon the life of the wife in this kind of a case only, but in other crimes;' which has also been said by Aulus Gellius, Noctium Atticar. book 10, c. 23; [Beloe's translation: 'husbands had a right to kill their wives when taken in adultery,' quoted by Aulus Gellius from Marcus Cato's oration De Dote.; and 'A husband, when he puts away his wife, judges his own cause as a censor, and has it seems entire control in the matter.'] Carol. Sigon. book 1 de jur. civ.; Anton. Matthaeu, book 48, ff. tit. 3, c. 1, n. 1, and Balduinus not only says this, but he adds examples of the like private judgment not only in this but in other crimes, from which, what Bartolus has said about a 'judge,' remains proved (vericata) in the case of a husband, and the husband appears to have been chosen as the minister of the law by this so ancient rule."

[N. 18, 19, 20. In these sections Matthaeu et Sanz discusses the Spanish authorities leading to the same conclusion.]

N. 21. "For which reasons, and others, very many Doctors have approved this opinion, and almost all the supreme tribunals of Europe observe it in practice." [Citing here many authorities.]

N. 22. "And this opinion the Royal Court of Audience of Valentia followed in a case reported by me, book 2 de Regim. c. 8, § 8, n. 62, where I copied the very elegant remarks of Cassiodorus upon the subject. Nor has Farinacius, the very zealous adherent to the contrary opinion, dared to deny the power of just resentment to excuse from the severity of capital punishment, for in qu. 121, n. 118, after he has expressed this contrary opinion, he thus concludes: 'What should I say? The matter is

in my view extremely doubtful, for the causa honoris, and just resentment, which continually oppresses the heart, are strong reasons for the mitigation of the penalty'."

N. 23. "But why is this remarkable when the Jurisconsult says of this just resentment in said law si adulterium, Imperator, 'it was most difficult for him to restrain his just resentment;' and when Juvenal said of it, Satire 10: 'That resentment of yours made greater demands than any law has granted to resentment?' For throughout the entire law it is called 'justus;' indeed by that law itself husbands are enjoined to be angered; so Ulpianus says in the law, mariti 29, in princ. ff. ad leg. Jul. ad adulter.: 'for he ought to be angered with his wife also, who had violated his matrimonial rights.' Nor is this merely directory (simpliciter), but under a penalty, as he immediately adds: 'Moreover then the husband is to be punished, since he is not able to excuse his own ignorance, or to obscure his patience with the pretext of incredulity.' For the lex Julia is not only aimed against adulterers, but also against husbands who tolerate adultery; and although Ulpianus in this text is speaking about a husband who knew of the adultery by [actual] 'detection;' the same reason

N. 24. (which is the spirit of the law), applies in the case of one who knows for a certainty that adultery has been committed, as Dexartus, dec. 5, n. 13, more at large discusses the matter. If therefore the law imposes a penalty upon a husband because he 'obscures his patience with the pretext of incredulity,' shall it impose a severe penalty because he follows the commands of the law?"

N. 25. "To which I also add:—A husband is punished as a pander who tolerates his wife's adultery when he cannot 'excuse his ignorance of it,' or 'obscure his patience with the pretext of incredulity;' if he brings an action against the adulterers, he is made a laughing stock with everybody, and what is more, with the Judges, who generally consider him a man of no reputation, as the following have said [here numerous authorities]. And if they had not said so, experience shows the very thing, and so no other way remains for a husband than to take vengeance with his own hands; for, if he should be severely punished for this, he

N. 27. would remain most wretchedly ensnared and entangled, since he would find his remedy on every side difficult and even inaccessible. For, if the laws direct adultery to be punished in such a way that the punishment is impossible,—for what man of established honor will act as prosecutor so as to wield the sword like an executioner against his wife and her adulterer before the public? — either some other remedy must be contrived to restrain the frailty of women and the lust of adulterers, or the reins should be loosened for husbands so as to excuse them, especially if they inflict vengeance as soon as they can, since

then it appears that they have killed immediately (in continenti)." [Citing authorities].

N. 29. "From which authorities the common practice is that the effect of resentment should be considered, and only the excess punished, so that if there is present a suspicion of craft in the manner of killing, as for example, a circumstance tending to show treachery, the punishment is increased, but if the husband has killed immediately in the fury of his resentment, it should be remitted. And so it was decided in the case presented, by condemning Francesco Palomeque to the punishment of the galleys for ten years. Sentence November 22, 1667, Actuary Francisco Antolin; by reason of the treacherous aggravation of firearms aggravating the penalty. To a like penalty there was condemned Antonio Alvarez, who deliberately killed his wife because she led an evil life, October 15 of the same year; Actuary Francisco Moscoso, the penalty being increased because he was adjudged to have been derelict, since he did not complain of her mere adultery, but of her living as a prostitute, which she could not have done without the indifference or connivance of her husband. But Alfonso Añaia Agaso, commonly called 'the cruel' (el crudo) was condemned to a lighter penalty, who had killed his wife because she had committed adultery in his absence, which she confessed to her husband; he was banished to the garrison (praesidium) for six years by sentence of December 15, 1659; Acutary Francesco Mançano. From which can be collected the practice of the Aula in calculating similar penalties in proportion."

MATTHAEU ET SANZ, CONT. 13.

N. 1. Facti species narratur.

"Didacus Estevan was engaged in a feud (odio prosequebatur) with Jacobus Muños his father-in-law, whom he had a long time ago wounded. Firearms were discharged at Jacobus, by Didacus as it is believed, who took flight, and on arriving at the city of Valentia, planned to compass the death of his father-in-law. He sought out assassins to accomplish this by shooting Jacobus, for which he had given a sum of money. These men on December 3, 1659, discharged a gun at the father-in-law who was saved from it in a remarkable manner. The direction to kill appeared in letters written by Didacus in his own hand and acknowledged by him; the employment of money appeared by the confession of the defendant himself, and the execution of the plot by the evidence of the deed itself, and the marks of the leaden bullets (glandium plumbearum) found in the wall nearby; and although Jacobus had neither been killed nor wounded, the question was debated what punishment should be inflicted on Didacus, who had finally been arrested."

After a lengthy discussion the decision of the court was as follows:

N. 23. "In view of all these things, since to the crime of parricide there was superadded the depraved and monstrous aggravation of assassination, and to them the treacherous employment of fire-arms, and the reiterated intention of killing his father-in-law, whom he had first severely wounded, and then fired a gun at him, and finally hired assassins to kill him, from which the defendant's depraved purpose and persistent intention were discovered, the decision was that he be beheaded in the ordinary way, because the rigorous conditions of the penalty of parricide should not be imposed, inasmuch as the attempt had been unsuccessful; and thus it was declared by decree, January 13, 1660, which was carried into execution on the 15th day of the same month, the actuary being Petro Marron, at the time an official of the Aula and its secretary."

APPENDIX No. 4

GLOSSARY

The grammarian and the philologist will find much material in the O. Y. B. and the law books of the medieval and post-medieval periods. I am neither, but have, however, ventured to note a few of the peculiarities of the Latin as found in the Book, and have added a Glossary of unusual words and special meanings.

Verbs used as auxiliaries; especially:

HABERE: as in § Sed cessare, LXVI, Ch. IX, sec. 20, etiamsi maritus illos suspectos haberet, had suspected them.

ESSE: with present active participle as in Farinac. qu. 43, n. 34; Etiam quod duo aut plures sint contra eamdem personam deponentes.

VALERE: in sense of posse, to be able or sufficient, can or may; very frequently so used in the O. Y. B.

VELLE: with infinitive, § Caeterum quatenus, LXXVI, Ch. VIII, sec. 75, quae iram provocare voluisset, which could have excited anger.

VENIRE: in Digest with perfect passive participle as, jus, quod sine scripto venit compositum, etc. Dig. 7, 2, 2, 5; very frequent in the O. Y. B. with future passive participle as, idem dicendum venit, the same should be said; id affirmandum venit, this should be affirmed, etc. § Hoc stante, XXV, veniret puniendus, should become punishable, Ch. VIII, sec. 3.

POSSE: often in the sense of may, as § Pro quo, CXCIX, Ch. X, sec. 53, quia timere potest.

REMANERE is often used to denote definite, final or completed action. § Verum etiam, CCXLVI, Ch. XII, sec. 5, conjugalis amor extinctus remanserit, her conjugal love had become completely extinguished. § Modo, CCXLIII, Ch. XII, sec. 2, causa remansit terminata, since the cause has been definitely brought to its end.

IPSE loses its reflexive meaning and is employed as a demonstrative, as in § Ultra quod, XLIII, Ch. XI, sec. 19, and passim.

SE is used as a demonstrative. § Quo vero, CCXLVIII, qui ad hunc effectum sibi propositus fuit, who was suggested to her for this purpose, Ch. XII, sec. 9.

IDEM often in the sense of "said," and for ille.

The superlative of adjectives is frequently used merely for emphasis.

Instead of the genitive, de is used with the ablative as in § Facti ideo, LXI, domum de Comparinis, Ch. VI, sec. 59.

The ablative absolute is freely used in an elliptical manner. Entire sentences or even sections of the argument are thus abruptly introduced. Thus Praemisso. § Honoris causa, XLI, praemisso enim quod, Ch. XI, sec. 2, it being premised or I say in the beginning. Constito, it being established, § Alia quoque, CLXXXVIII, Ch. X, sec. 74, constito de inhonestate uxoris. Addito, attento and cognito are frequently found. So also the future passive participle, as animadvertendo and considerando, § Ulterius, XXX, Ch. VIII, sec. 21, and the present active participle refragante, § Parum refragante, CCLIV, Ch. XII, sec. 22; urgente in § Urgente, LXX, Ch. VI, sec. 66. Accedente in § Accedente, LXXIV, Ch. VI, sec. 74. In § Non relevantibus, CLXV, Ch. VI, sec. 101, the participial phrase is especially abrupt. So also many instances will be found of the use of Absque eo quod, without this that, as equivalent to "this is so notwithstanding that," etc. It is also used as meaning "without" as in § Eodemque, CCLII, Ch. XII, sec. 20, absque eo quod cognosceret eam esse talem, "without knowing that it was she," or "without recognizing her." § Voluissem, CXXXVIII, absque eo quod mihi communicentur, Ch. XI, sec. 28, "without communicating them to me."

Among the neologisms are numerous verbal adjectives in –ilis and –bilis denoting, passively, capability or desert; and in –ivus, denoting ability to produce the action expressed by the verb. Some of these words, from which our English words are derived, will be included in the Glossary.

A

ABDUCTIO: abduction, cf. deviatio, and raptus.

ABHINC: from this point, of time, or argument.

ABOMINABILIS: abominable, horrible.

ABSOLUTORIUS: of acquittal or discharge.

ACCEDERE: to approach; attack; go about. Accidit, there is added. Accidente confessione, there being added the confession.

ACCESSORIUS: accessory as distinguished from principal.

ACCESSUS: a going to, approach, visit.

ACTUALIS: actual.

ACTUS: act, § Pro quo, CXCIX, in actu depraehensionis uxoris; impulse, § absque eo, CXCIX, in ipso actu inconsulti doloris.

ADAPTABILIS: with dat. suitable to.

ADHAERERE: to be close at hand, to adhere, § In jure, CXCVIII, huic opinioni adhaeserit, adhered to this opinion. Used technically of those assisting in a lawsuit, or of prosecutor, § Accedente, LXXIII, ad instantiam inquisiti tunc aderentis. Arrestum per adhaesionem, arrest by detainer, Scanarolus de Visit, Book 3, cap. 8, n. 11. So in cases of appeal, when the appellee "adhered to the appeal" of the other side he (apparently) had the benefit of a rehearing as though on his own appeal. Guazzinus Def. 36, cap. 3, n. 9.

ADHUC: yet, moreover.

ADMITTERE: frequent in O. Y. B. to commit (evil).

AEGREFERRE: with infin. to take it ill; trans. with acc. to be displeased with.
AFFECTARE: to affect, to make believe, feign.
AFFECTATE: insincerely, by trickery.
AFFECTATUS: affected, insincere, feigned.
AFFIRMATIVUS: affirmative (side or opinion).
ALIAS: otherwise, in other cases, in other circumstances.
ALIQUALITER: in some measure. D'Arnis, ex parte, quodam modo.
ALLEGABILIS: that can be alleged. § Quin obstare, CXC, nulla causa est allegabilis.
ALLEGATIO: argument.
ALTERARE: to alter or change.
ANIMOSE: bitterly, zealously, with prejudice.
ANIMOSITAS: prejudice or animas.
ANIMOSUS: bold-spirited, § Similiter nil, XVII; prejudiced, § Mutua, CLXXVIII.
ANIMUS: prejudice.
ANNULLATIO: annulment.
APPENSATE: deliberately, with forethought; as we say "with malice aforethought." D'Arnis, consulto, dedita opera.
APPENSATUS: deliberate, with forethought.
APPLICABILIS: with dat. applicable, casui nostro applicabilis.
APPROXIMATIO: nearness.
ARMA IGNEA: firearms.
ARMA SULPHUREA: firearms.
ARRESTARE: to arrest.
ARTICULUS: point (of law); also the charge or specification in an indictment.
ARTIFICIALIS: artificial.
ASPORTATIO: carrying or taking from one place to another.
ASSASSINIUM: killing by craft or by assassins.
ASSERTIO: assertion.
ASSUMPTUM: an assumption.
AUCTOR, AUCTRIX: one who promotes the welfare of another; benefactor, § Modo autem, CCXLIV, Autricis famam vindicare. Ab authore confirmatum (of testimony), Chartar. Inter. Reor. B. 3, ch. 3, n. 30.
AUTHORITAS: authority in the legal sense, the opinion of a court or doctor.

B

BANNIMENTALIS: contained in the Banns.
BENEFICIATUS: benefited, a beneficiary.

C

CAETERUM: besides, in caeterum, in conclusion, § Caeterum, CXXII.
CALUMNIOSE: trickily, by fraud.
CANONIZARE: to make a matter of record, to register in court, to establish by decree of court; to include in Canon law, cf. Gloss, leg. 7

Cod. Cornel. de Sicariis, "haec lex est canonizata," de poenis Dist. 1, "Si quis cum telo." Also — canonizatus, sanctioned by the authorities, § Et in rei, CI a majori numero D.D. canonizatur.

CANTARE: to sing. D'Arnis, Missam celebrare; dire la Messe, as we say, to sing or say Mass; hence to recite. E. g., "J. B. exhibuit bilancium (balance, i.e., an account) quod cantabat hoc modo, etc.," Scanarolus de Visit. App. III. "Homicidium de quo cantat dicta sententia," Bassanus lib. 6, cap. 2, n. 9. Sometimes slightingly: "Sed glossa potest cantare quantum vellet, quia solutio est contra, etc.," Bartolus, quoted by Woolf, p. 6. Raynaldus after stating that of the defendants in a homicide case one was acquitted and the others sent into exile, adds: "Nec Fisco profuit tam bene cantare." Vot. 37, n. 18 — Decantare; same meaning but stronger, de in comp. = valde. Du Cange = recitare, as the Psalms. "Quod decantatum stylum tribunalis Gubernii Urbus mihi contingit id," = often repeated. Cf. etymology of descant. Raynaldus Vota 175, n. 26. In O. Y. B. § Quibus adstipulatur, CIII, de domus decantata pauperitate, of the oft recited poverty of the home.

(IN OMNEM) casum: at any rate; cf. Italian, in ogni caso; French, en tous cas.

CENSURA: prohibition (of a law).

CERTIORARE: to inform, frequent in Ulpian.

(PRO) CERTO: for certain, certainly.

CESSARE: primarily to loiter or be slothful; then to stop or cease; in later Latin to be absent or wanting, not to exist, or be lacking. See Roby, Introduction to Justinian's Digest, 103.

In § Quod etiam, CXIX, poenae cessant; § Primo quod, CCXXXI, Statuta cessant, do not apply. In § Restat modo, CV, cessantibus tractamentis, aside from the ill treatment.

CESSATIO: cessation.

CIRCUMSCRIBERE: circumscripta; to cancel, annul, set aside: Calvinus, s.v. abrogare et obliterare, frequenter hoc significatur Verbum Juris, et classicis auctoribus. § Idque manifestum, CLXIX, circumscripta qualitate Raptus.

CIRCUMSTANTIA: quality or attribute; qualification or explanation; qualifying circumstance, cf. qualitas, with which it is often joined.

COADUNATIO: literally a summing-up, Codex 5, 12, 31 fin.; an assembly, conventicle, congregation.

(TOTO) COELO: utterly, absolutely, radically.

COHONESTARE: to do honor to or grace; hence to gloss over or palliate.

COLLOCATIO: establishment.

COMBINATIO: comparison. D'Arnis, conjunctio, assemblage par couples.

COMMISSARIUS: deputy (of a Governor, etc.)

COMPATIBILIS: compatible.

COMPLICITAS: complicity.

CONCLUDENS: conclusive.

CONCLUDENTER: conclusively.

CONDEMNATORIUS: finding guilty, with gen. of person.
CONDIGNUS: deserving, worthy, hence deserved, condign (of punishment).
CONDORMITIO: sleeping together.
CONDUCERE: (1) to lead together, assemble, collect, (2) to hire.
CONFORMIS: similar.
CONNIVENTIA: connivance.
CONSEQUENS: consequence.
CONSERVATORIUM: a place of safekeeping; as asylum. Ital. refuge or workhouse.
CONSIDERABILIS: considerable, worthy of consideration, important.
CONSIDERATIO: consideration, attention.
CONSIGNATIO: a written proof or document. In O. Y. B. = traditio. delivery: § Quarta, CCII, consignationem epistolae.
CONSOBRINUS: In § Quemadmodum, XXIX, 30, Soror consobrina. Generally a cousin; strictly as if consororinus, a child of a mother's sister, as patruelis signified a child of a father's brother; amitinus, a child of a father's sister; and sobrinus, a child of a mother's brother (or as some say, of a mother's sister like consobrinus). See Dig. 38, 10, 1, 6, Calvinus and Brissonius. Letters of Cassiodorus, Book 7, 46, in Hodgkin, p. 345, a formula legitimating marriage with a first cousin. But as is said in the Digest 38, 10, 10, 15, "Sed fere vulgus omnes istos communi appellatione consobrinos vocant." The sex of the person should be sufficiently indicated by the gender of the word, as consobrinus, consobrina, but not infrequently frater or soror was used, consobrinus being strictly an adjective just like germanus, where we have frater germanus, and soror germana. The subject of these words of relationship is difficult and involved.
CONSTANS, CONSTANTER: constant, consistent, steadfast.
CONSTITUERE: to found or establish. § Demum, fundamentum constitui potest. § Minusque, LXXIII, Constitutum super litteris, constitutus, placed or situated. § Reditus, LXX, in vitae discrimine constitutam. § Quod autem, CLXVIII, in carceribus constituti—also § Vindicata, CCLII, ad constituendam Pompiliam de adulterio ream, to convict her of adultery: — § Nupserat, IX, in dignitate constituto, to one occupying the position, etc.: Constitutum, testimony or depocition (often in plural). § Minusque, LXXIII, ut ipsa fatetur in suo constituto. Also: constitutus personaliter (before a judge or official) arraigned or appeared. Ut in honore constitutus facere potuisset, Sanfelic. dec. 337, n. 37, as he should be bound in honor to do.
CONSTITUTIO: generally in O. Y. B. a law or ordinance, especially one promulgated by Emperor or Pope. Also, a contract. § Verum etiam, CCXLVI, lis super nullitate constitutionis dotis.
CONTINGENTIA: contigency, happening: in contingentia facti, in an actual case, when the case occurred.
CONTRECTATIO: strictly, an illegal appropriation to one's self, stealing. See note to § Primo quia, CLXX, non pro sola contrectatione, the taking for the purpose of theft, asportation.

CONVENTICULA: an illegal assembly, like conventicle in English law.
COPIA: copy. According to Brachet copia = abundance, hence facere copiam, to multiply by frequent writing. According to others, copia = abundance, hence power; facere copiam describendi, to allow a copy to be made, hence copia = transcript. Vid. Oxford Dict.
CORRESPONDENS: correspondent to, with dat.
CORRESPONDENTIA: correspondence (epistolary); acquaintance or intimacy.
CRIMINALISTA: an authority on criminal law, or practitioner therein.
CRIMINOSUS: criminal.
CURARE: to manage, bring about, procure.
CUSTODIA: safekeeping.

D

DECANTARE: see cantare.
DE DIRECTO: directly, or perhaps, justly.
DEDUCERE: D'Arnis, enarrare, raconter, to recount, explain in detail.
DEFENSA: defense.
DEFERRE: to accuse. § Sed utcunque, CLXXXV, viro instante ac illam deferente. Of weapons, to carry or bear arms.
DEFINITIVUS: definitive, of a sentence or decree.
DELATIO: bearing or carrying (arms).
DE PER SE: of himself or itself. D'Arnis, par soi même.
DEPLORABILIS: deplorable.
DEPLORABILITER: deplorably.
DEPOSITIO: deposition, affidavit.
DESCRIBERE: to write down (in an inventory).
DESERVIRE: D'Arnis: fungi aliquo munere, remplir une fonction; also, mereri, mériter. § Et quatenus, CXXX, declaratio ad nihilum deserviret, serves no purpose, or deserves no credit.
DESUMERE: to deduce or to show.
DETESTABILIS: detestable.
DEVIATIO: a leading astray, seduction. See note § Absque eo, CXXVI. § Idque manifestum, CLXIX, and s.v. raptus. One of the offenses of which Caponsacchi was convicted, viz.: complicity in the elopement of Pompilia, her seduction, and carnal intercourse with her. According to DuCange and D'Arnis, the word implies force, a via sua aliquem per viam abducere, but this is not its meaning in the O. Y. B., the distinction being clearly drawn by all the authorities. Riccius Praxis, p. 4, res. 437, n. 3; Raynaldus Obs. Ch. 22, sec. 1-10, n. 182; Dynus, dec. 34, n. 17, who distinguish between deviatio, or seductio, and raptus, which is against the will, whereas deviatio or seductio is voluntary even if induced by deception.
DIFFIDATUS: as technical term, see note, § Accedit, LXXVIII, Ch. X, sec. 65.
DISCEPTATIO: question, dispute, argument.
DISPARITAS: inequality, difference. See paritas.
DISPECTORATUS: presumably with the coat off, or disrobed. Used not only in O. Y. B., but in other law books, with discalceatus,

i.e., with shoes off or barefoot. In O. Y. B. with "caligis solutis." § Condormitio, CLXXX; § Tandem, CCLIII.

DISPENSATUR: with dat., is dispensed with, § Et licet, XLIV, dispensatur uni ex delictis requisitis.

DISPOSITIO: order, 1, in sense of arrangement. 2, in sense of direction or command; purview of a statute.

DISTINCTE: with distinctions or qualification.

DOLUS: originally an artifice, but by an easy transition, with or without malus, trick, fraud, deceit; nor exactly equivalent to any English word, but as technical term in law correspondent with (1) trick, or fraud in dealing with another as opposed to bona fides or good conscience, either by suggestio falsi or suppressio veri. (2) Malice, i.e., intention without just excuse, in the law of torts as opposed to culpa or negligence. (3) Criminal intent in the law of crimes. Labeo in Dig. 4, 3, 1. See Roby Introduction to Justinian's Digest, p. 130. Hunter Roman Law 2nd Ed. 595.

DUBITABILIS: doubtful.

E

EFFECTUS: purpose, effect, result; esp. ad effectum, for the purpose or to the effect. § Multo magis, CCXXX, ad effectum punitionis, with regard to the operation of the punishment.

EFFORMARE: ex-formare, to form completely, to shape or fill out.

EMENDICARE: to obtain by beggary or entreaty. § Praesertim, CXXX, (attestationes) mendicatae pendente lite. Cf. mendicare.

EQUIVOCUS: equivocal.

EVADERE: to become, turn out, prove. § Coadunatio, CLXXXIX, evaderet frustanea dispositio. To escape. § In nostro, CLX, non impunitus evaserit.

EVULGATIO: publication.

EXAMEN: examination, like depositio and constitutum q.v.

EXARARE: to plough, hence, to write on tablets with a stylus, and in general, to write.

EXASPERATIO: lit. roughness, bitterness, exasperation; hence a roughening or increase (of punishment).

EXCARCERARE: to discharge from prison. § Demum, CCLV, in mandato de excarcerendo.

EXCITATIVUS: § Fateor quidem, CXCVI. Suspicio doloris excitativa, that excites or arouses just resentment.

EXCLUSIO: denial, refutation.

EXCLUSIVUS: with gen. exclusive of, excluding, or that will exclude.

EXCULPARE: to exculpate, to free from blame. See inculpare.

EXCUSABILIS: excusable.

EXCUSARE: with infin; § Itaque gravissima, CCII, excusetur offendere.

EXEMPLIFICARE: to certify officially; D'Arnis, ad exemplar describere.

EXEQUI: to accomplish. § Pro quo, CXCIX, Vindictam exequi non valeat. Of service of process, § Alia quoque, CLXXXVIII, exequutum contra abbatem.

EXONERARE: to unload, discharge; so also exoneratio; onerare, to load or charge, onustum as if oneratus, loaded; of firearms, arquebus, etc. In Pliny and Petronius, exonerare vesicam, ventrem, stomachum, "petiisset ire ad exonerandum ventrem" (during torture), Chartar. Praxis Inter. Reor. B. 4, ch. 2, n. 7, and exonerate in English in this sense. Andrew Boorde, Dyetary of Health, ch. 8. So in Raynaldus Obs. cap. 24, sec. 7, n. 28, one who carried an arquebus "onustum intus sed cum rota dimissa," was sentenced to be hung. "In articulo mortis pro exoneratione eorum conscientiae," relief of conscience. Vermigl. cons. 20 princ. In O. Y. B. § Quoniam, CXIII, inquisitus pro exoneratione archibusiatae. § Non negat, CXXI, terzarolum onustum.

EXONERATIO: See exonarare. § Exceptio, CLXVI, tendens ad propriam exonerationem, her own exoneration.

EXPEDIRE: to disentangle, hence to dispose of separately. § Quod autem, CLXVIII.

EXPIABILIS: expiable, homicidium non est expiabile.

EX SE: § Et sane, CVIII, Statuisset ex se, had made upon her own mind.

EXSEQUUTOR: or exequutor; a sheriff's officer.

EXEMPLUM: a precedent.

EXEQUUTIO: execution, carrying out.

EX POST: afterwards.

EXPRESSIO: expression, recital.

EXTENSUS: a notary's word or term of art. Cf. DuCange, spread out, entered at large; drawn up or drafted.

EXTRINSECUS: extrinsic. See Intrinsecus.

F

FACERE: to cause with infinitive; e.g., facere nos gaudere.

(DE) FACILLI: readily, easily.

FACTI SERIES or FACTI SPECIES or SERIES FACTI: a statement generally chronological, of the facts of a case. Italian, "serie del fatto" in Pamphlet 10, CXLVI, 149. "Fattispecie," full particulars or report of of a case. E.g., § Facti ideo series, LXI. § Attamen, LXIV, in hac nostra facti specie; in the facts of this case of ours.

FACTI SPECIES. See Facti series.

(DE) FACTO: as opposed to de jure, by his own act. § Similiter XVII, jure medio et non de facto. Concerning one's own act, § Coadunatio, CLXXXIX, sibi de facto jus dicentium. De facto or in facto, in fact, as a matter of fact, actually. § Nec relevat, CXXXI, nunquam vidi de facto. § Dixi nil, CLXIV, ob insubstantiam in facto et irrelevantiam in jure.

FALLENTIA: an exception to a rule of law or statute, i.e., where it fails. Cf. Crusius de Indic. P. 1, ch. XX, n. 9. Raynald. Obs. ad Ch. 1, Supp. V, n. 84.

FAMIGERATISSIMUS: very celebrated.

FAS EST: licet.

FAVORABILIS: favorable; with dat. favorable to.

FERRE: to pronounce sentence or judgment.

FIDES: faith in various derivative senses: (1) evidence; (2) credibility or credence, § Eodemque, LXXV, fidem non meretur; (3) fidelity, § Talis autem, CLXIV, conjugalem fidem violaverat; (4) certificate, § Multo magis, CCXXX, habeamus fidem baptismatis; (5) affidavit, § Non relevantibus, CLXV, desumatur ex fidibus extra judicialibus.

FIGURATIO CASUS: a formal statement of a case or question of law — D'Arnis; figura judicii = juris formula, as we say the "outline" of a case, or syllabus. Much used by the Glossators to reconstitute the hypothesis on which the text proceeds.

FORIJUDICATIO: judgment or sentence of outlawry; a putting under Ban. Bannitur sive forijudicatur, id est, ab omni judicii aditu foris judicatur, et in poenam condemnatur.

FORISJUDICARE: to outlaw.

FORISJURARE: to abjure.

FORINSECUS: a foreigner, opposed to intrinsecus.

FORMA: form (of the statute) as in English.

(IN) FORTIIS: in the power of, hence under the protection, cf. protestas, § Quarta qualitas, LXVI, in fortiis curiae.

FRUSTRANEUS: vain, of no effect, useless.

FUGA: escape, flight, absconding, elopement. Pompilia was charged with fuga a viro; her indictment, trial, etc., were called processus fugae. In commercial law fuga signified absconding from creditors. The word was also used in cases of flight to escape prosecution, etc.

G

GAUDERE: to enjoy a privilege; to rely upon.

GEMINATUS: double or repeated; thus when laws are given in two places in the Digest, they are called leges geminatae. A confessio geminata means apparently a confession repeated at different times or in different circumstances, e.g., during torture and afterwards. § Nec verum est, XXVI.

GRADUS: stage of a lawsuit, e.g., in gradu appellationis.

GRAVIDENTIA: the being pregnant, or state of pregnancy.

GUBERNIUM: government or management.

GUBERNIUS = GUBERNATOR: governor; as bannimenta gubernii. Perhaps for gubernatio, government.

H

(H) ABILITARE: to make legally capable; to give or impose legal capacity or liability; as e.g., in case of minority. Cf. inhabilis.

HABITACULUM: dwelling, habitation.

HUJUSMODI: of this kind, such a, that sort of, this method of, etc.

I

IDENTITAS: identity, e.g., identitas caracteris, identity of the handwriting.

IDIOMA: idiom, vernacular. § Superest, CXCI, Scriptura Italico idiomate exarata.

IMMEDIATE: for Immedietate, D'Arnis; immediately, § Ultra quod, XV; immediate is sometimes used for immeditate, without premeditation.

IMPINGERE: § Nam quoad, CCXLVII, etc., detestabile crimen impingere, to lay this detestable charge against her parents. So in § Prout nec, CCL, § Modo autem, CCXLIII, perhaps for impactus. In Phormio Act 2, dicam tibi impingam grandem. In § Ex osculis, XI, § In progressu, CX, oscula impicta, kisses snatched. Plautus has suavium impingere, to snatch a kiss. DuCange gives impinctio = impulsio, sollicitudo, perhaps here, kisses solicited? Impictus, were there such a word grammatically formed, might mean painted on, or as we say imprinted.

IMPLACABILIS: implacable.

IMPLICITUS: implicit, implied. § Desumenda, CLXXV, nisi fornicationis implicitam confessionem involvant.

IMPROPRIETAS: impropriety, improper use, irregular character.

IMPUNIBILIS: unpunishable.

INAPPLICABILIS: inapplicable.

INCERTITUDO: uncertainty.

INCOMPATIBILIS: incompatible. In ecclesiastical law used of two benefices held together.

INCONGRUUS: inconsistent, incongruous, unsuitable.

INCONTINENTER: incontinently, immediately. D'Arnis, quam cito, quam maturius.

INCULPARE: to incriminate, to free from blame. See exculpare.

INDAGO: examination, investigation, scrutiny, used as a sophistical argument. § Altera causa, CXVII.

INDELEBILIS: indelible. § Modo autem, CCXLIII, indelebilem infamiae notam.

INDETERMINATUS: undetermined, indefinite.

INDICIATUS: suspected, used of one against whom there are indicia or suspicion of guilt.

INDICIUM: cf. Ital. indizio. A suspicious circumstance; circumstantial evidence, esp. in law of torture.

INDIGNUS: Vid. DuCange s.v. indignare D'Arnis, se conduire d'une manière inconvenante. § Eademque, CLXV, ne indignus reputetur, lest he be considered derelict in his duty.

INDISPENSABILIS: indispensable, as indispensabile requisitum.

INDISTINCTE: without qualification; unqualifiedly. So in Swinburne on Wills, indistinctly, Part 4, sec. 6.

(IN) INDIVIDUO: unanimously, as one man. § Idque non, XXXVII.

INDIVIDUITAS: indivisibility.

INDIVIDUUS: an individual. § Imo si, CXV, error individui, a mistake as to the person.

IMFORMATIO: argument, cf. allegatio.

INFORMITAS: deformity, hence informality. § Quoniam, CLXV, informitas probationis.

INHABILIS: lacking legal capacity.

INNEGABILIS: undeniable.

INSCRIPTIO: inscription, title, heading.
INSENSUS: unfeeling, hostile.
INSINUARE: to make mention of. In Dig. 32, 1, 11, voluntatem suam heredibus.
INSTANTANEUS: instantaneous. § Ultra quod, XV, de actu instantaneo. Syn. momentaneus.
INSTANTIA: see instare.
INSTARE: to urge or press upon, hence to bring an action or prosecute; instantia = contentio, demand, hence suit or prosecution: ad instantiam (frequent), at instance or prosecution of. § Modo autem, CCXLIII, potest haeres pro fama instare; § Curavit, XVII, instantias factas per Guidonem. So of a right of action surviving: Quando instantia transeat ad successorem, Antonius de Sousa Dec. Lusitaniae 51. On motion of, Ad querelam Titii instante procuratore Fiscali, Bassanus B. 6, ch. 1, n. 91. § Demum, CCLV, me instante. § Sed utcunque, CLXXXV, viro instante ac illam deferente.
INSTRUERE: § Neque probatio, CLXXX, unum lectum instrui, one bed to be made up. Cf. Struere.
INSUBSISTENS: unsubstantial, without foundation; non-existent.
INSUBSISTENTIA: unsubstantial nature, lack of foundation.
INSULTUS, -ŭs: assault; also as ludibrium, insult.
INTERCEDERE = esse, to be; when a relation between two persons or things is expressed. § Maxime, LXXIV, nihil mali intercedebat. § Zelotipia, CLXXVII, in casu intercedentis amoris.
INTERESSE: interest. § Minusque, CLXVI, cum interesse non sit considerabile.
INTERESSENTIA: immediate presence.
INTERVENIRE: to intervene, to take part in or have a hand in. § Honoris, XLI, qui homicidiis intervenerunt: § Socii, XXII, illum profitentur caedibus intervenisse.
INTRINSECUS: tangled. Cf. Furness's note, Antony and Cleopatra, Act 5, sc. 2, 1, 357: intrinsic, § Et quidem, CCXXX, ex causa intrinseca. Cf. extrinsecus.
INTRINSECUS ET EXTRINSECUS: within and without, outside and inside; intrinsecus: a dweller within, a citizen, opposed to forinsecus.
INVERISIMILITUDO: improbability, unlikelihood.
IRRELEVANS: irrelevant.
IRRELEVANTIA: irrelevance.

J

JOCALIA: see DuCange; trinkets or jewelry.
JUSTIFICARE: to justify, in sense of to prove.
JUXTA: according to, § Quae benignior, XVI.

L

LAESIVUS: with gen. injurious to.
LAICALIS: lay (of clothing, proper to a layman). § Sed profecto, CXI, Vestibus laicalibus indutus.

LECTURA: reading, perusal.

LEGITIMITAS: legitimacy. § Cavendum, XXX. Suspectus de non legitimitate, suspected of illegitimacy.

LOTRIX: Cambridge Dict., a laundress that washeth both linen and woolen cloth. § Domam reversi, IX.

M

MAGISTRALIS: with the authority of a teacher or judge, authoritative. § Sed cessat, XLV, ut est magistrale votum (of a decision of the Sacred Rota). The saying of one who speaks with original authority, and not as the scribes, who repeat the opinions of others.

MANERE = existere, esse, to stay, remain, to reside. § Pro quo, CXCIX. Manente uxore sub potestate judicis.

MEDIA (neut. plur): means. § Neque, XLVI, ne pejora videantur media.

MEDIANS, MEDIUS: by means of (in ablative). § Credo, CXIII, mediante, divino auxilio (frequent in O. Y. B.)

(IN) MEDIUM PROFERRE: to bring before the court.

MENDICARE: to obtain by beggary or entreaty. § Sed cessare, LXVI. assertionem esse calumniose mendicatum, solicited by trickery. Cf. emendicare.

MILITARE: to fight against, to oppose, operate against. Cf. suffragari.

MINIME: not at all, none whatever, by no means.

MINORATIO: diminution, lessening.

(NEC) MINUS: not even. § Quarta, LXVI, nec minus bannitum occidi posse; § Secunda, LXV, minusque in domibus.

MODERATIO (classical): moderateness; guidance; hence medieval meaning, modification: See DuCange.

MODO: now, for nunc.

(CIRCA) MODUM: measureably, to some extent. § Quoniam victoria, CCI.

MOMENTANEUS: momentary. § Ultra quod, XV. Syn. instantaneous.

MONASTERIUM: a monastery or convent.

MONIALIS = MONACHA: a nun.

MONITORIUM: or monitio, warning; judicial notice, service of citation. § Alia quoque, CLXXXVIII, ob nullitatem monitorii.

MONTIVARE: to move in argument; discuss. § Nescimus quo, CCXXXI. Nec quidquam motivarunt.

MOTIVUM: motive. § Attento, CCXLIX, unicum motivum.

N

NEGATIVUS: § Quibus controversiis, LXII, negativi super tractatu, those who denied their participation in the plot. § Alii vero, LXIII, negativam (opinionem) firmantes.

NOTIFICARE: to notify, to give judicial notice.

NOTORIETAS, notoriety: and in a legal sense public notice by means of judicial record.

NOTORIUS: made known or public, notorious, hence made public as a matter of judicial record.

NULLITAS: invalidity, illegality.

NULLITER: illegally.

O

OBJECTUM: objection.
OCCASIO: occasion.
OFFENSIVUS: with gen. injurious to, offensive to.
ONERARE: to load. See exonerare.
ONUSTUM: loaded. See exonerare.
ORDO: order in the sense of command. § Haec sane, XXII, dedisse ordinem ad incidendam faciem uxoris, an order to cut his wife's face.

P

PALLIARE: to cover with a pallium or cloak, to conceal. § Sed laudare, CXIV, palliavit gravidentiam, concealed her pregnancy (as with a cloak).
PARIFICARE: to treat as equivalent, to equalize.
PARIFORMITER: likewise, in like manner, equally.
PARITAS: equivalence.
PARTICULA: a clause.
PARTICULARIS: partial, particular, special.
PARTUS AEDITUS: the child born.
PARTUS SUPPOSITUS: see suppositus.
PASSIVUS: from patior, capable of suffering; passivus from pando, occurring here and there, or frequently. D'Arnis, uncertain or vague. In O. Y. B. passive as opposed to active, used of statutes to signify that the common law is changed only so far as the statute by strict construction, expressly directs, passivam interpretationem a jure communi.
PEIUS: ad omne peius, at the very worst.
PERMANENTIA: DuCange, perpetuitas. In ecclesiastical Latin permanere, to abide in a rule or mode of life. In O. Y. B. § Similiter, XXII, ad temporalem permanentiam in monasterio, temporary residence in a monastery.
PREQUISITIO: search.
PERSONA: orig. a mask, hence the personage, character or part represented by an actor. Later, and in O. Y. B. used of a man considered in connection with office, rank or social position. § Usus quoque, CLXXIX, persona ecclesiastica; § Quidquid, CLXIV, qualitatem casus atque personarum. Sometimes simply rank or dignity (DuCange). § Nec verum, XXVI, qualitas personae, qualifying circumstance of rank. Or as person or individual irrespective of rank. § Sed cessare, LXVI, extensio de persona ad personam; § Cum igitur, XXX, homicidium commissium in personam uxoris. — Or as personality. § Tertio, CLXX, persona offendens quam offensa, the personalty of him who commits the injury. Sometimes it is difficult to differentiate the meaning: Cf. § Quidquid, XXXVIII, non potest egredi personam. § Sicuti, XXXI, homicidium commissum in personam Bovini a Francisco persona vilissima. See note § Qualitas vero, CCIV, Ch. V, sec. 28.
PERSONALIS: pertaining to the person. Cf. realis.
PIETAS: piety, pity, compassion. Cf. D'Arnis, idem quod aumône.

PONDERATIO: weighing, consideration of.
POSSE: power or custody.
(PRO) POSSE: so far as possible. So far as (he) was able.
POSSESSORIUS: possessory. D'Arnis, jus quod spectat possessionem In O. Y. B. § Quoniam victoria respiciebat possessiorium, CCI, a misprint for possessionem.
POTESTAS: power, hence protection. Cf. in fortiis.
PRACTICA = praxis, practice. Cf. theorica, theory.
PRACTICARE: to practise.
PRAECEDENTER: previously, before.
PRAE CETERIS: before others, i.e., preëminently.
PRAECIPITOSUS: headlong.
PRAECISE: exactly; perhaps, positively. § Omnemque, LXXV, magis praecise deponit.
PRAEGNANTIA: pregnancy.
PRAEJUDICARE: to prejudice, operate to one's injury. In § In contentione, CCXLIII, almost in sense of prejudge.
PRAEJUDICIUM: prejudice, injury: sometimes in literal sense of a prejudgment.
PRAEPARAMENTA: preparations.
PRAEPARATIO: procurement.
PRAEPARATORIUS: preparatory.
PRAESEFERRE: to exhibit, to show.
PRAESTARE: to accomplish, execute, perform, Part. praestitus, afforded to, furnished to.
PRAESUMPTIVE: by inference or presumption. § Tandem longe, CCLIII, non de certa scientia, sed praesumptive.
PRAESUPPONERE: PRAESUPPONENS: to presuppose, take for granted. Cf. supponitur.
PRAETENDRE: to allege, claim or attempt in argument, but sometimes to pretend. Swinburne Part 7, sec. 8, "pretending herself to be the next of kin."
PRAEVENTIVE: previously or lately.
PRIMAE CLASSIS: of the first class. § Nec verum, XXVI, Scripserunt doctores primae classis.
PRINCIPALIS: adject. principal.
PROBARE: to approve, to affirm or declare.
PROCEDERE: to go on, to proceed. Fisco permittitur procedi, to proceed further in the trial. § Pro cujus, CLXXXVII, instantia ut procederetur, that an action should be brought. Frequent in O. Y. B. meaning, of a law or decision, to hold good or apply.
PROCESSUS: legal process, prosecution, indictment, trial. Processus fugae or super fuga, the prosecution of Pompilia for elopement; processu fabricato or constructo, an indictment having been framed.
PRODITORIUS: treacherous.
PRODUCTIVUS: § Adeoque cum, LXXI. Causa metus productiva, productive of. In Cassiodorus in sense of "fit for prolongation."
(EX) PROFESSO: openly, expressly, professedly.

PROPORTIONATUS: proportionate. D'Arnis, conveniens, congruus.
PRO UT: accordingly, just as, perhaps used in § Praetensus, CLXXVII, in sense of although, quatenus probaretur pro ut nullo modo probatus.
PUNCTUALIS: accurate. D'Arnis, punctualiter; diligenter, sedulo. § Praeterea, XLIII, ultra punctualem auctoritatem Marsilii.
PUNCTUM: point, in puncto; on the point, of law or fact.
PUNIBILIS: punishable.

Q

QUALIFICATUS: altered in quality or grade.
QUALITAS: quality, nature, condition, social position, attribute, characteristic. Used specially throughout the O. Y. B. of a fact or circumstance which alters the grade of a crime by aggravating or diminishing it. The pamphlets of the Fisc, Nos. 4, 6, 11, 13, and 14 are entitled "Romana Homicidii cum qualitate."
QUANTITAS: sum or amount (of money).
QUATENUS: how far, thus far, so far as; used particularly in O. Y. B. as meaning, in case that, admitting or assuming for the sake of argument; sometimes in the sense of "if."
QUIN: beginning a paragraph — the case is not as though; it is not as if.
(EX) QUO: from what time, since; from which, from the fact that, because, although; in case that. "Canonici sunt clerici, ex quo qui est homo est animal;" Bellettus, Par. 1, sec. 14, n. 23.
QUOTIES: whenever, at a time when, in case where, if.

R

RAPTUS: abduction; see note § Idque manifestum, CLXIX, Ch. VII, sec. 18, and § Modo autem, CCXLIII, and s.v. deviatio. Not rape, rapere is to carry off or abduct a person against her will, Decianus Tract. Crim. lib. 8, cap. 7. It is raptus whether the abduction is for purposes of lust or marriage; violence is the essential feature, and it would seem that raptus may be made of a boy also. Raynaldus Obs. cap. 22, sec. 1-9, n. 4, 7, and 182.
REBANNITIO: removal of ban. § Praeterquamquod, CXVI.
REFOCILLARE: to revive, to warm to life, to refresh. "Poeta est factor ejus dicti, versus, et carminis, quo alius refocillatur." Damhouderius, Index 151.
REFORMATORIUS: in active sense, modifying or reforming.
REINTEGRATIO: restoration, making whole. D'Arnis, in integrum restitutio.
REGULARITER: as a rule, according to rule, generally.
RELATIO (causae): a report; especially the report or opinion of the judges in a case. D'Arnis, consultatio a judicibus ad principem missa in rebus dubiis.
RELATIVE: § In facto, CXCV, ad quem relative se habet, to which he refers.
RELATIVUS: relating or relative to. § Non relevante, CXCV. Subrogatio tituli ad processum relative. § Eoque minus, CLXVII, generalem

titulum ad processum relativum, a general title referring to the record, etc. § Quod autem, CLXVIII, quibus dispositio relativa congruit, with which the relative arrangement is consistent.

RELEVANS: relevant, important.

RELEVANTIA: relevancy.

RESISTENTIA: resistence.

RESPECTIVE: respectively; with respect thereto.

RESULTARE: to rebound, re-echo, appear, arise, result.

RETORQUEO: to twist back; used of an argument or authority that proves to be a boomerang. § Quia pro, XLIII, § Ne applicantur, CLXXVIII. § Eademque CLXV. Of an insult or injury, to resent or retaliate. § Caeterum CLXXXII.

RETORSIO: retaliation, of an insult or injury. § Caeterum CLXXXII.

RIGOROSITAS: rigor, severity.

RIGOROSUS: rigorous, strict, severe.

RIXOSUS: in a quarrel.

S

SALVUS CONDUCTUS: safe-conduct.

SATIUS SATISFACTUM (esse): to be more fully informed.

SCANDALOSUS: scandalous.

SCHEDA OR SCIDA: a strip of bark, hence a leaf or sheet of paper. Dim. Schedula, schedule, a small leaf or scrap of paper, not in the German sense of treaty, but meaning a note. § Nam praeterquamquod, CIV, schedas repertas in carcere. See § Eoque minus, CLXVII, facta fuit in schedula transmissionis, warrant. Another form: cedula in Final judgment, CCLX.

SCILICET: for instance. § Eodemque, LXXV. quod scilicet luna luceret, of course, certainly, indeed, you know. See note § Accedit, CX, Ch. VI, sec. 14.

SCLOPULUS (um): DuCange, sclopetus (um), Tormentum bellicum manuale, also Sclopus, sclopetum (us) (a). In O. Y. B. § Adeoque cum, LXXI. § Verum etiam, CCXLVI, igneo breviori sclopulo — a rather short firearm — a pistol.

SENSUS: view or point of view.

SEQUOR: especially past part. sequutus or secutus; occurred, followed, resulted, took place, was accomplished or committed.

SFRISIARE: vid. Hoare Ital. Dict. Sfregiare, to disfigure, to gash with a knife, to injure with a strong acid, from fregio, decoration, with the privative prefix. Query as to derivation from frictio? See note § Haec sane, XXII, Ch. VIII, sec. 66.

SIMULTANEUS: simultaneous.

SIQUIDEM: since indeed, or indeed.

SOLLICITUDO: responsibility; § Eoque minus, CLXVII (perhaps solicitude), § Superest, CXCI.

(IN) SPECIE: in particular, particularly; as opposed to in genere, in general.

SPECIES: see facti species.

SPECIFICATIO: enumeration — DuCange.
STANS: appearing, being established.
STRUERE: to spread, make ready, arrange. § Pro quo, CXCIX, ampla strueretur via, the path would be made too broad. Cf. instruere.
STYLUS: course of decision, practice (of a court).
SUADERE = persuadere: to persuade, show.
SUBSISTENS: holding firm, substantial.
SUBSISTERE: to stand firm, to have weight or foundation.
SUBSTANTIALIS: essential, substantial.
SUBTACERE (subticere): to pass over in silence, to suppress.
SUCCESSIVE: for subsicive: occasionally. § Ac propterea, CLXXII, ex epistolis successive conscriptis. See note § Quemadmodum, XXIX, Ch. VIII, sec. 37.
SUCCESSIVUS: uninterrupted; protracted; without intermission. See note § Quemadmodum, XXIX. § Ultra quod, XV, habet tractum successivum.
SUFFICIAT: it is sufficient, i.e., proper.
SUFFRAGARI: to vote for, to favor or support, to aid or enable.
(AD) SUMMUM: at the most.
SUPERFLUITAS: superfluity.
SUPPLICIUM ULTIMUM: death.
SUPPONERE: to allege, to pretend.
(MIHI) SUPPONITUR: I am informed, I understand. Cf. Praesupponens.
SUPPOSITUS PARTUS: substituted child. Ital. parto supposito. § Ulterius, CXXVII, partum supponere, to substitute a child. Suppositio partus, substitution of a child. See note § Credidit infelix, XIX, Ch. IX, sec. 4.

T

TANQUAM: as, not "as though;" note § Nec ad, CLIX, Ch. X, sec. 47.
(IN) TANTUM: in brief, § In tantum, CXXVI. In tantum fuit condemnatus dumtaxat; only, § Absque eo, CXCIX, quod in tantum neglexit, quia erat inermis.
TEMERARE: to desecrate, profane.
TEMERARIUS: sacrilegious.
TEMERATIO: desecration, profanation.
TEMPORALIS: temporary, § Similiter, XXII, ad temporalem permanentiam in monasterio; temporal as opposed to ecclesiastical, § Secundo, CLXX, extra ditionem temporalem.
(DE EO) TEMPORE: at or about that time.
TERMINUS: term of court, § Instrumentum, CCLIX, omnes et singulos terminos. Generally throughout the O. Y. B., in terms; in the case of; in such a case; under such conditions. In terminis tormenti vigiliae, in the case of torture of the vigil. Termini simplicis mandati, the conditions of a simple mandate. In terminis mariti, in the case of a husband. In his praecisis terminis, in our exact case. In terminis blasphemiae, a case of blasphemy. Matt. et Sanz, cont. 67, n. 10. In fortioribus terminis, in a stronger case: extra terminos Alexandrinae, beyond the terms of the Bull of Alexander, etc.

TERZAROLUS: lit. the third part of anything, used of a horse-pistol as one-third of an arquebus in length. § Non negat, CXXI.

THEORICA: theory. Cf. practica.

TITILLO: for titillatio tickling. In § His praehabitis, CIX, tintillo.

TITULUS: as in English (1) as relating to ownership of real or personal property, "justa causa possidendi id quod nostrum est," Coke 1 Inst. 345; (2) the title of a case, including as a component part of it, the description of the crime, as in this case Romana homicidiorum, hence the crime itself with which the defendant is charged in the indictment, or processus constructus, § Quod autem, CLXVIII. See note § Absque eo, CXXVI, Ch. VII, sec. 2, titulus causae qui non facit reum, and Franc. Jos. de Angelis, Tract. crim. De habilitate reorum p. 5; and § Exindeque, CLXVIII. § His potius, CLXVII. (3) tittle, etymologically same as title, inscription. § Demum, XVIII, non uno titulo assumptae.

TOTALIS: total, entire.

TOTALITER: totally.

TRACTARE: to handle. § Facti ideo, LXI, se male tractatum, ill-treated; to discuss or treat. § Nec in hoc, XLIV, nec in hoc casu tractari potest de poena; to plan or plot. § Tertio, CLXX, tractans in urbe delictum.

TRACTATUS: handling, hence discussion, treatise, tract; also frequently as previous arrangement, plan, conspiracy or plot. Tractatus est discussio quaedam, indago et colloquium inter aliquos de aliquo peragendo. Vermigl. cons. 31, n. 1. Handling, i.e., treatment, § Et licet, LXX, ex specificatione tractatuum; ex pessimis tractationibus. Plot or conspiracy, § Quibus controversiis, LXII, negativi super tractatu.

TRADUCTIO: leading or conducting away. § Idque manifestum, CLXIX. Cf. deviatio.

TRAMES: road, way, journey.

TURBATIVUS: with gen. disturbing to.

U

UNDIQUE: completely, altogether.

UNICE: singly, solely, entirely.

UNICITAS: the quality of being the only one, singleness, as a witness.

UNICUS: single, sole, unsupported (of a witness).

(HOC) UNUM (EST): this one thing is true. § Hoc unum, CXVI. § Dixi, XIX; or perhaps, it comes to the same thing?

UXORICIDIUM: uxoricide.

V

VERIFICABILIS: capable or susceptible of proof or verification.

VERIFICATIO: verification, corroboration.

VERIFICARI: to be verified, or corroborated; to exist as a fact, to be realized. § Quin obstare, CXC, si dicta qualitas verificaretur, be accepted as correct. § Cum ergo, CXCI, exasperatio non nisi de poena

capitali verificari possit, cannot be effected without the capital penalty. § Qualitas vero, CCIV, quatenus etiam verificaretur, even admitting that this proposition be considered correct.

VERIFICATIVUS: § Hic potius, CLXVII, probatio illius verificativa, in verification of this.

VERTERE: to turn, to revolve, to result, or simply, to exist.

VICARIUS: deputy of an official or judge.

VICE VERSA: reciprocally, on the other hand. As in English vice versa.

VIGERE: to flourish, or simply to be or exist. Ital. vigere, to be in force.

VILIS: cheap, hence of social status, base, lowborn. Dig. 48, 5, 25; Cod. 9, 9, 4. Later, non ignobilis sed turpis. Farin. cons. 141, n. 2. Pauper non est vilis, quia non paupertas, sed mali mores faciunt hominem vilem. Bertazz. Vol. 1, cons. 42, n. 18. § Quamvis, CII, examen vilis mulierculae.

VINDICTA: vengeance. Vindicta facti — juris; vengeance by one's own hand, or by the law.

VIRTUALIS: virtual.

VOLO, VELLE: to will; to lay down as law; used of a lawgiver as Emperor or Pope, to ordain as law or decree; of a law as lex voluit, it is the purpose of the law; of a law writer, to express an opinion; also, to attempt, mean, or intend. Sometimes as auxiliary "will."

VULGATUS: well known, familiar.

INDEX OF SECTIONS OF THE ARGUMENTS IN THE O. Y. B.

Pamphlet 1. Archangeli, for Defense			Chap.	Sec.
§§ Nupserat sinistris	O.Y.B. IX	E. 11	VI	1
Domum reversi			VI	2
Decrescente in dies			VI	3
Eadem desperatione	X	E. 12	VI	4
Magnum quidem			VIII	1
Quod idem			VIII	2
Et praemisso			VI	6
Ex litteris	XI	E. 13	VI	8
Ex ingressu			VI	15
Ex osculis			VI	19
Ex condormitione			VI	21
Sed etiam			VII	1
Ultra quod			VI	25
Quibus praehabitis			VIII	10
Nam praeterquamquod	XII		VIII	11
Adverti humiliter			VIII	29
Quoties enim		E. 14	VIII	30
Et in rei			VIII	35
Relaxatio	XIII		VIII	41
Fateor esse			VIII	42
Quod bene		E. 15	VIII	43
Eo intensius	XIV		VIII	44
Solatium ex publica			VIII	45
Quocirca ubi			VIII	16
Nec talis sententia		E. 16	VIII	17
Praeterea est	XV		VIII	46
Ultra quod			VIII	47
Proinde his		E. 17	VIII	18
Et idem practicatum	XVI		VIII	19
Quae benignior			VIII	62
Neque delictum			VIII	64
Similiter nil	XVII		VIII	48
Similiter nil, vers. Sanfelic dicta			VIII	40
Curavit ejus		E. 18	VIII	49
Parum etiam	XVIII	E. 19	X	34
Nec maeretur			X	32
Objectum funditus			X	38
Demum ob homicidia			IX	1
Dixi et ut	XIX		IX	2
Aut in veritate		E. 20	IX	3
Credidit infelix			IX	4
Non erit igitur	XX		IX	5
Ad quid autem		E. 21	IX	6
Nec quicquam	XXI		IX	17
Quamobrem puto			IX	12

				Chap.	Sec.
§§ Et non semel	O.Y.B.	XXII	E. 22	IX	13
Similiter uxor				IX	14
Haec sane				VIII	66
Socii et comites				VIII	68
Licuit ad defensam		XXIII	E. 23	VIII	69
Pamphlet II. Spreti for Defense					
Ex processu	O.Y.B.	XXV	E. 27	VI	5
Hoc stante				VIII	3
Et ita conciliando [Not translated by Professor Hodell]				VIII	4
Quamquam ad hoc		XXVI	E. 27	VIII	32
Nec verum est			E. 28	VIII	12
vers. Afflict		XXVII		VIII	13
vers. Matth.				VIII	7
vers. Novar		XXVIII	E. 29	VIII	31
vers. Dexar				VIII	33
Et ratio est		XXIX		VIII	36
Quemadmodum semper			E. 30	VIII	37
Suppetit quoque				VIII	39
Cum igitur		XXX		VIII	20
Ulterius				VIII	21
Cavendum autem			E. 31	VIII	22
Sicuti etiam		XXXI		VIII	23
Jure itaque				VIII	24
Et haec nostra			E. 32	VIII	25
Praedictis		XXXII		VIII	63
Et quidem		XXXIII		VIII	65
Non autem				IX	15
Addito insuper				IX	16
Absque eo quod			E. 33	X	25
Et in omnem		XXXIV		X	29
Similiter nec				X	36
Facilius igitur			E. 34	X	33
Si igitur		XXXV		V, 1; VIII	67
Quatenus vero				V	2
Delictum autem		XXXVI		V	4
Quae dicta sunt			E. 35	XI	1
Idque non obstante		XXXVII	E. 36	XI	12
Et in fortioribus		XXXVIII		XI	13
Quidquid in contrarium			E. 37	XI	14
Neque vero		XXXIX		X 14;	XI 22
Quae eo facilius				XI	26
Praesertim cum				XI	27
Et haec sunt				XI	45
Pamphlet III. Archangeli for Defense					
Honoris causa	O.Y.B.	XLI	E. 41	XI	2
Maxima controversia				XI	3
Sed sum quaestio				XI	4
Nos versari				XI	5
Sed insuper				XI	6
Qui vero citantur		XLII		XI	7
Et in contingentia			E. 42	XI	8
Nec afficit				XI	15

				Chap.	Sec.
§§ Quia pro fundamento	O.Y.B.	XLIII	E. 42	XI	16
Et in consil.				XI	17
Praeterea Rolandus				XI	18
Ultra quod Rolandus				XI	19
Unde si		XLIV	E. 43	XI	20
Si igitur paena				V	3
Et licet amplissimae				V	5
De qua agi				XI 21;	V 6
Nec in hoc			E. 44	X 3;	V 7
Quod comprobatur		XLV		X	4
Et licet Farinacius				X	6
Sed cessat omnis				X	7
Ea potissimum				X	8
Additur quod				X	9
Neque rigorosa		XLVI	E. 45	XI	23
In omnem casum				XI	24
Licet per constitutiones				V	8
Et in terminis		XLVII		V	9
Et videmus				V	10
Pamphlet V. Gambi for Prosecution					
Deplorabile excidium	O.Y.B.	LXI	E. 65	VI	58
Facti ideo				VI	59
Quibus controversiis		LXII	E. 66	VI	60
Hinc cum haec		LXIII	E. 67	VIII	72
Alii vero				VIII	73
Attamen in hac		LXIV	E. 68	X 42; VIII	74
Quia Doctores				X 42; VIII	74
Circumstantiae vero				X	43
Prima enim				X	49
Prima enim, Vers. Quae circumstantia				X	51
Non enim credimus		LXV	E 69	X	52
Secunda qualitas				X	60
Si ergo sub				X	61
Tertia circumstantia		LXVI	E. 70	X	76
Quarta qualitas				X	78
Sed cessare videtur				IX	20
Caeterae vero		LXVII	E. 71	IX	21
Pamphlet VI. Bottini for Prosecution					
Quoniam ut auditum	O.Y.B.	LXIX	E. 75	VI	61
Examinanda itaque				VI	62
Et quidem				VI	63
Et licet ipsae		LXX	E. 76	VI	64
Reditus ad urbem			E. 77	VI	65
Urgente etiam				VI	66
Nullatenus vero		LXXI		VI	67
Justior etiam			E. 78	VI	71
Adeoque cum				VI	72
Nec inhonestatis		LXXII		VI	73
Eaque ulterius			E. 79	VI	76
Minusque subsistit		LXXIII		VI	78
Accedente praesertim			E. 80	VI	79
Accedente insuper		LXXIV	E. 81	VI	74

				Chap.	Sec.
§§ Levioris ponderis	O.Y.B.	LXXIV	E. 81	VI	85
Maxime cum				VI	86
Eodemque defectu		LXXV	E. 82	VI	91
Omnemque praetensae				VI	99
Caeterum quatenus		LXXVI	E. 83	X 43; VIII	75
Praecipuum autem				VIII	77
Idque est adeo		LXXVII	E. 84	VIII	80
Solumque de poena		LXXVIII		VIII	87
Accedit ad exasperandum			E. 85	X	65
Plurimum quoque		LXXIX	E. 86	X	75
Plurimum quoque, vers. Multo magis				X	79
Tandem est quoque				X	58
Pamphlet VIII. Archangeli for Defense					
Confessio D. Guidonis	O.Y.B.	CI	E. 109	V	17
Quod pro certo				VIII	26
Et in rei veritate				VIII	27
Dominus vero		CII	E. 110	VIII	28
Quamvis nobis				VI	27
Sed si veritatem		CIII	E. 111	VI	28
Causa vera				VI	29
Quibus adstipulatur				VI	30
Non negamus				VI	31
Hinc verificatur				VI	32
Et in alia		CIV	E. 112	VI	33
Inanis est				VI	40
Nam praeterquamquod				VI	41
Primordium veritatis			E. 113	VI	34
Idque similiter		CV		VI	35
Verificatur ulterius				VI	36
Quod comprobatur				VI	37
Et ab epistola				VI	38
Ecce igitur				VI	39
Restat modo			E. 114	VI	42
Ex ejus enim		CVI		VI	9
In prima epistola				VI	10
Vice versa in litteris		CVII	E. 115	VI	11
Et epistola 19				VI	12
Comprobatur ulterius			E. 116	VI	13
Patet igitur		CVIII		VI	43
Et sane si justum			E 117	VI	44
Prout labitur		CIX		VI	45
His praehabitis			E. 118	VI	46
His praehabitis, vers. Ex litteris				VI	8
Ingressus vel egressus				VI	16
Projectio ejusdem		CX		VI	17
Modus quod fugam				VI	18
Accedit quod			E. 119	VI	14
Accedit quod, vers. Non puto				VI	7
In progressu itineris				VI	20
Quo circa nemo		CXI		VI	24
Sed profecto omnes				VI	22
Qualis quippe			E. 120	VI	23

				Chap.	Sec.
§§ Demum sententia	O.Y.B.	CXI	E. 120	VII	8
Praesertim quia		CXII		VI	26
Nec relevat				VI	47
Et ratio est				VI	48
Parum obstante				VI	56
Credo et sperare		CXIII	E. 121	VI	57
Ex his igitur				VIII	38
In nihilo refragante				VIII	50
Quoniam toto				VIII	51
Quo vero		CXIV	E. 122	VIII	52
Sed laudare				VIII	57
Placeat interim			E. 123	VIII	58
Non negamus		CXV		VIII	59
Imo si D. Guido				VIII	60
Nec refert quod			E. 124	X	35
Praeter quam quod		CXVI		X	41
Si ultima poena				IX	7
Hoc unum est			E. 125	IX	8
Aut adhuc durasse		CXVII		IX	9
Cumque tum				IX	10
Altera causa			E. 126	X 26; IX	18
Utrumque sit		CXVIII		V 24; X 27; IX	19
Quae etiam aptantur				X	30
Qualis paena ultimi				X	10
Quod etiam remanet		CXIX	E. 127	X	11
Et quod congregatio				X	5
Remanet tandem				X	15
Quod etiam procedit		CXX		X	17
Non me latet			E. 128	X	18
Supplico adverti				X	19
Praeterea D. Guido		CXXI		X	20
Non negat penes			E. 129	X	21
Idque facilius				X	22
Nec relevat				X	23
Demum nec		CXXII		X	24
Non loquor				XI	25
Caeterum enixe			E. 130	VIII	71
Pamphlet IX. Spreti for Defense					
Confessiones D. Guidonis	O.Y.B.	CXXV	E. 133	V	11
Ut enim dicebamus				V	12
Neque vero				V	13
Delictum autem				V	14
Verum et socios		CXXVI	E. 134	XI	10
Absque eo quod				VII	2
In tantum vero				VII	11
Nec verum est				VII	4
Eoque magis		CXXVII		VII	6
Sed ad quid				V	15
Ulterius non est			E. 135	V	16
Hujusmodi enim		CXXIX	E. 136	V	18
Indubitanter quando				V	19
Praesertim quando				V	20
Causam autem		CXXX	E. 137	VI	49

				Chap.	Sec.
§§ Praesertim cum	O.Y.B.	CXXX	E. 137	VI	51
Maxime cum				VI	52
Et quatenus fidem			E. 138	VI	53
Et quatenus, vers. Et sicuti				VI	50
Nec valet dici		CXXXI		VI	54
Subsistente itaque				VIII	14
A qua quidem				VIII	53
Et generaliter		CXXXII		VIII	54
Et tantum abest			E. 139	VIII	55
Et facit etiam		CXXXIII		VIII	56
Tanto magis				VIII	61
Nil autem relevat				V	22
Et quatenus hanc			E. 140	V	23
Agnoscit fiscus		CXXXIV		X	1
Et ratio est		CXXXV	E. 141	X	12
Non refragante				X	13
Et in terminis				X	16
Similiter ad effectum		CXXXVI		X	37
Nec quidquam facit			E. 142	X	39
Utraque autem				X	40
Et in his praecisis				VIII	5
Inquit enim Ulpianus		CXXXVII		VIII	6
Alii vero Doctores				VIII	8
Adeo ut qui				VIII	9
Quo vero ad litem			E. 143	X	28
Altera lis		CXXXVIII		X	31
Quoad Blasium				XI	42
Voluissem etiam				XI	28
Pamphlet XII. Gambi for Prosecution					
Ad quid tempus	O.Y.B.	CLIX	E. 165	VII	12
Stricte ideo				VIII 76; X	45
Quo jacto fundamento				X	46
Nec ad posternendum			E. 166	X	47
In nostro casu		CLX		X	48
Neque subsistit				X	63
Minus applicantur			E. 167	X	66
De causa litis		CLXI		X	67
Quod autem provocatio				X	68
Et haec currenti			E. 168	X	69
Pamphlet XIII. Bottini for Prosecution					
Redarguit D. Meus	O.Y.B.	CLXIII	E. 171	V	29
In fine vero				V	30
Praemissa propterea				V	31
Dixi nil novi		CLXIV	E. 172	VIII	82
Quidquid enim				VIII	83
Talis autem			E. 173	VI	100
Non relevantibus		CLXV		VI	101
Quoniam omnes				VI	102
Eademque replicatione				VI	103
Minusque obstare		CLXVI	E. 174	VI	104
Exceptio vero				VI	105

				Chap.	Sec.
§§ His potius ad abundantiam	O.Y.B.	CLXVII	E. 175	VII	14
Eoque minus				VII	15
Ex indeque corruit		CLXVIII		VII	16
Quod autem			E. 176	VII	17
Idque manifestum		CLXIX		VII	18
Agnoscit D. meus			E. 177	VII	19
Primo quia		CLXX		VII	20
Secundo quod				VII	21
Tertio quod				VII	22
Quarto quod			E. 178	VII	23
Exclusa itaque		CLXXI		VII	24
Prout etiam				VII	25
Et quoniam		CLXXII	E. 179	VI	68
Ac propterea				VI	69
Verificationis quoque		CLXXIV	E. 180	VI	70
Satius quidem			E. 181	VI	77
Desumenda		CLXXV	E. 182	VI	80
Urgente praesertim		CLXXVI		VI	82
Levis propterea			E. 183	VI	83
Longe debiliores		CLXXVII		VI	84
Ingressus et egressus				VI	87
Ad quam etiam				VI	88
Praetensus quoque			E. 184	VI	89
Zelotipia in aliquibus				VI	81
Ne applicantur		CLXXVIII		VI	90
Mutua deosculatio			E. 185	VI	92
Augeterque inverisimilitudo		CLXXIX		VI	93
Nullum fomentum				VI	94
Usus quoque			E. 186	VI	98
Condormitio tandem		CLXXX		VI	95
Neque probatio				VI	96
Et quamvis		CLXXXI	E. 187	VI	97
Ex his cum				V	32
Hujusmodi honoris		CLXXXII		V	33
Nimis autem				V	34
Caeterum non est			E. 188	VIII	86
Multoque minus		CLXXXIII		VIII	89
Quis autem affirmare			E. 189	VIII	90
Dilatio pariter		CLXXXIV		VIII	91
Electa proinde			E. 190	VIII	92
Absque eo quod		CLXXXV		VIII	93
Sed utcunque				IX	22
Quae tamen ultra		CLXXXVI	E. 191	IX	23
Tantumque abest				IX	24
Praetensae vero				IX	25
Vera igitur causa		CLXXXVII	E. 192	X	72
Pro cujus sanctionis				X	73
Alia quoque lis		CLXXXVIII	E. 193	X	74
Coadunatio pariter		CLXXXIX		X	56
Quin obstare		CXC	E. 194	X	57
Praeparatio pariter			E. 195	X	64
Superest tandem		CXCI	E. 196	X	81
Cum ergo				V 35; X	85

	Pamphlet XIV. Bottini for Prosecution			Chap.	Sec.
§§	Deducta per D. meum	O.Y.B. CXCV	E. 199	V	25
	Praecipuum itaque			VIII	84
	In facto siquidem			VI	75
	Non relevante		E. 200	VII	13
	Fateor quidem	CXCVI		VIII	88
	Neque obstat			VIII	78
	Quod adeo verum	CXCVII	E. 201	VIII	79
	Solamque suspicionem			VIII	81
	In jure quoque	CXCVIII		VIII	85
	Sed quatenus		E 202	X	44
	In primis quippe			X	50
	Pro quo effugiendo	CXCIX		X	53
	Absque eo quod		E. 203	X	55
	Secunda qualitas	CC	E. 204	X	59
	Nec delationis			X	62
	Tertia qualitas	CCI		X	70
	Quoniam victoria		E. 205	X	71
	Quarta et quidem	CCII		X	77
	Quibus accedit		E. 206	X	80
	Itaque gravissima			X	82
	Ex his cum abunde	CCIII		V 26; X	83
	Caeterum nec etiam		E. 207	V 27; X	84
	Qualitas vero	CCIV		V	28
	Pamphlet XVI. Spreti for Defense				
	Omissa ulteriori	O.Y.B. CCXXVII	E. 229	VIII	34
	In praesenti sumus			VII	3
	Non autem praeterire			VII	5
	Tanto magis quod		E. 230	VII	7
	Sicuti praeterire	CCXXVIII		VII	9
	Quod vero poena			VII	10
	Et quidem quamvis			VIII	15
	Est autem pulchra		E. 231	VI	55
	Firmo itaque			IX	11
	Confessio D. Guidonis	CCXXIX		V	21
	Sicuti autem causa			X	2
	Et sicuti ista		E. 232	XI	11
	Facilius vero			XI	43
	Et quoad Dominicum			XI	29
	Multo magis cum	CCXXX		XI	30
	Et quidem de necessitate			XI	31
	Licet vero non			XI	32
	Et quod haec		E. 233	XI	33
	Maxime quando	CCXXXI		XI	34
	Nescimus quo			XI	35
	Primo quod			XI	36
	Secunda responsio			XI	37
	Tertia denique		E. 234	XI	38
	Recurritur enim	CCXXXII		XI	39
	Itaque sunt			XI	40
	Cujusmodi esse			XI	41
	Quatenus vero			XI	44
	Denique respectu			VIII	70

GENERAL INDEX

Advocate of the Fisc, office of, 40, 41.
Advocate of the Poor, office of, 40, 41.
Aerodius, Petrus (Pierre Ayrault), 334.
Alexander Baldeschi, 516, 517; torture of, 97.
Angelus de Gambilionibus of Arezzo, 527.
Animals, prosecution against, 358.
Appeals to the Pope, 17.
Archangeli, Giacinto, 15, 39, 43. Fee as Procurator Pauperum, 398.
Archiconfraternitas of Charity, 41.
Areopagus, Case before the, 411.
Auditor of the Camera, 67.
Baldus de Ubaldis, 186.
Bartolus, 118, 135.
Beatrice Cenci, case of, 317. Appendix 1, 631 et seq.
Beccaria, Marquis, 79
Bellettus, Joannes Maria, 245.
Bertazzolius, Bartholomaeus, 164.
Blanchettus, Laurentius, 436.
Blasius or Biagio Augustinelli or Agostinelli, 110, 516; defense of, 557.
Bottini, Giovanni Battista, 15, 39, 43, 44.
Briefs, endorsements on, 27.
Brooke, Stopford, 45.
Burton, John Hill, 54.
Caballus, Petrus, 534; criticized in argument, 533-537.
Caepolla, Bartholomaeus, 538.
Calesse, 10; name of driver of, 14.
Canon law, 61.
Capital punishment, 68, 92.
Caponsacchi, Guiseppe Maria, ecclesiastical office, 9; elopement with Pompilia, 10; banishment of, 11; his visits to Pompilia, 155, 231-234.
Caprara, Alexander, 313.
Cassiodorus, M. Aurelius, 297.
Castrensis, Paulus, 350.
Cencini, Francesco, 25, 35.
Chartarius, Flaminius, 88.
Chasseneux, Barthemy (Bartholomaeus Chassaneus), 358.
Chesterton, G. K., 45.
Child substitution, 116, 401.
Clarus, Julius, 361.
Chronology of the facts, 19-24.
Civil and common law, distinctions between, 60.
Classification of crimes, 91-93; Clarus on, 92; Carpzovius on, 93
Coccinus, Joannes Baptista, 440.
Communis opinio doctorum, 62.
Consilia or Responsa, 57.
Convertites, Monastery of the, 18; Bulls relating to, 561.
Convict ship Success, 77.
Cook, A. K., ix.
Corpus Juris Canonici, 61.
Corpus Juris Civilis, 54; and the Gloss, 53; Rabelais' criticism of, 54; commentaries on, 56.
Cortiada, Michael de, 524.
Covarruvias, Didacus, 290.
Cravetta, Aymon, 233.
Crusius, Christophorus, of Hanover, 149.
Cyriacus, Franciscus Niger, 181.
Damhouderius, Jodocus, 444.
Decianus, Tiberius, 361.
Decisiones or Vota, 59, 60.
Defense of the lawyers, 47-49.
Delicts, 91.
Divorce, abolition of, 333.
Dolabella, the Proconsul, 411.
Domenico Gambassini, 516.
Dondeus, Josephus, 319.
Dowden, Edward, 45.
Elopement, evidence of the, 147; incidents of the, 157-159, 229, 235-243.
Examination de plano, 72.
Farinacius, Prosper, 302.

Felony, 94.
Flaminian way, 145.
Florence, statutes of, 553-555.
Francisco Pasquini (Antonii), 516.
Gabrielius, Antonius, 200.
Gaill, Andreas, quoted, 387.
Gambi, Francisco, 15, 39, 44.
Giurba, Marius, 327.
Glossators and Commentators, 53, 55-56.
Gomezius, Antonius, 358; quoted 387.
Governor of Rome, jurisdiction of, 67.
"Gracchian law," 53, 655, 656.
Grammaticus, Thomas, 323.
Guazzinus, Sebastianus, 449.
Guido Franceschini, Count, 4; arrest and trial of, 15; sentence of death, 17; examination de plano, 95; confession of, 96; criminal prosecution instituted by, 12; recourse to the law, 343-345; right to assistance, 357, 525-531; right to hire helpers, 359; instructions to helpers, 361; implication by helpers, 363; peroration of counsel, 365-367; lost opportunity, 393; motive for delay, 395; excuse insufficient, 421.
Homicides, classification of, 26.
"House Father," authority of, 308.
Howells, W. D. as a legal novelist, 48.
Inquisition, influence of, 74.
Interrogation, method of, 71.
Jardine, David, 76.
Jodocus (Damhouderius), Joost de Damhouder, 444.
Jubilee, years of, 7.
Justinian, 51.
Lamparelli, Antonio, 11, 39.
Lauria, Cardinal, 5, 142.
Law Latin of the O. Y. B. 35-37.
Laws of Solon, 290, 381.
Laws XII Tables, 290.
Lawyers in the case, 39-44; defense of, 47-50.
Lea, Henry C., 73.
Legal maxims, 62, 63.
Legal treatises and Consilia, 56-58.
Leopold, Grand Duke of Tuscany, 79.
Ludovicus, Emperor, 149.
Marsiliis, Hippolytus de 85, 559.
Marzials, Frank on Browning, 46.
Mascardus, Josephus, 179.
Menochius, Jacobus, 161.
Molinus, Francis, 224.
Murder in English Law, 26.
Muta, Marius, 322.
Nevizanus, Joannes, 159.
Paolo, Pompilia's letters to, 173, 205-209; authority of, 353; consent to Pompilia's discharge, 423.
Pamphlets of O. Y. B. contents, 26; completeness of, 35; language of, 35; intricate and involved style of, 37.
Parisius, Petrus Paulus, 536.
Peace of Constance, 185.
Phelps, William Lyon, 622.
Pietro Comparini, guilt of, 413; will of, 425; excuse of the lawsuits, 569.
Pompilia, full name, 3; marriage of, 5; suit for divorce, 12; her home as a prison, 12; criminal prosecution against, 12; birth of son, 14; decree absolving her memory, 18, 595; parents of, 142; love letters of, 149-154, 175-179, 221-227, 579-581; elopement of, 10, 215-220, 575, 583; her false testimony, 161; her excuses for elopement, 165-167; letters to Paolo, 171-173, 205-209, 573; dying declarations, 181-188, 245-255, 587; cause of her elopement, 199-204, 567; her fear of her life, 211-214; return to her home, 143, 351; instructions to disfigure, 361; feigned birth of, 401; rights of her heir, 563-565; her innocence, 571, 577; stay at Castelnuovo, 585.
Ponte Milvio, 14, 145.
Pope, Appeals to the, 17.
Procedure, Form of, 16, 17; in criminal cases, 70.
Processus Fugae (elopement), decree in, 589-591, 595.
Procurator of Charity, 42.
Procurator of the Fisc, 41.
Procurator of the Poor, rank of, 41.

Punishments, in general, 68, 69, 92.
Quaestiones, or discussions, 57.
Ratta, Franciscus, 313.
Raynaldus, Joannes Dominicus, 78, 318; quoted, 385.
Razzalius, Seraphinus Olivarius, 436.
Relegation or exile, 69; decree of, 257; modification of decree of, 259-263, 269-275; lenity of the sentence, 265, 277.
Reverend Apostolic Chamber, 66.
Ripa, Polydorus, 237.
Rolandus a Valle, 533.
Sacred Roman Rota, 65, 66; decisions of, 313.
Sanfelicius, Franciscus, 180; the case in, 325.
Scaletta, Monastery of the, 11, 12.
Scanarolus, Joannes Baptista, 104.
"She goat" in Torture, 87.
Signatura Justitiae, 67, 453.
Socinus, Marianus and Bartholomaeus, 213.
Spada, Joannes Baptista, 441.
Spreti, Desiderio, 15, 39, 43.
States of the Church, 65.
Syndicatus, 548.
Theodoricus, rescript of, 297.
Tighetti, Domenico, 18.
Tiraquellus, Andreas (André Tiraqueau), 212.
Thomatus, Dominicus, 453.
Torture, in general, 75, 103; abolition of, 79; in the O. Y. B., 97; indicia for, 95; Nicholinus on, 89; Zacchias on, 83.
—— of the cord, 79, 91, 88, 97.
—— of the Vigil, 82, 85, 86, 88, 90; requisitions for, 105-107; infliction of, 127-129; was properly decreed, 131-133.
Translation, problems of, 36, 38.
Treatises on practice and theory, 56.
Treves, Sir Frederick, 5, 46.
Trial, second stage of, 17, 31-34.
Trust estate (fidei commissum), 3.
Vengeance, immediate, 329; a right, 335; is self-defense, 337; as soon as possible, 341; Guido's first opportunity, 347; postponement of, 349; right lost by aggravating circumstances, 373; should be immediate, 389.
Venturini, Marco Antonio, 27, 44, 67.
Violante Comparini, allegations of Pompilia's birth, 3, 7, 8, 142; reception of Pompilia, 403; complicity of, 405; deception of Guido, 409; guilt of, 413.
Visconti, House of, 247.
Wessels, J. W. (Judge), 59.
Zacchias, Paulus, 80, 295; on torture, 83.
Zeithopf, Joannes, 381.

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